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No. 01-

IN THE
Supreme Court of the United States

AMWAY CORPORATION, RANDY HAUGEN, DEXTER YAGER, SR., RANDY WALKER, AND DONALD R. WILSON,

Petitioners,

v.

THE PROCTER & GAMBLE COMPANY AND THE PROCTER & GAMBLE DISTRIBUTING COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Procter & Gamble sued Amway and several independent distributors of Amway products for allegedly injuring P&G's reputation by repeating an incorrect, decades-old rumor that P&G is associated with Satanism. The court of appeals recognized that P&G is a public figure and that the speech at issue "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." The court nonetheless held that if the speakers' "motives in spreading the Satanism rumor were economic," their speech is "commercial speech," and is therefore entitled to *no* protection under the First Amendment. In light of these holdings, the questions presented are:

1. Whether speech at the core of the First Amendment can be deemed "commercial speech" based on the motivation of the speaker.

2. Whether the "commercial" nature of defamatory speech deprives it of all First Amendment protection, even when the plaintiff is a public figure suing for injury to reputation.

PARTIES TO THE PROCEEDING

Respondents The Procter & Gamble Company and The Procter & Gamble Distributing Company (collectively "Procter & Gamble" or "P&G") were plaintiffs/appellants below.

Petitioners Amway Corporation, Randy Haugen, Randy Walker, Dexter Yager, Sr., and Donald R. Wilson were defendants/appellees below.

WOW International, Inc., Wilson Enterprises, Inc., Freedom Tools, Inc., D&B Yager Enterprises, Inc., Kevin Shinn, Gene Shaw, Birdie Yager, Ronald A. Rummel, Freedom Associates Inc., Walker International Network, and Valerie Haugen were also defendants/appellees below. They are not petitioners in this Court because the district court dismissed the claims against them and those dismissals either were not appealed or were affirmed by the Fifth Circuit.

Pursuant to Rule 29.6, Petitioner Amway Corporation states that it is now known as Alticor, Inc., and is a privately-held corporation that does not have any parent corporations. No publicly-held company owns 10% or more of Amway Corporation's stock.

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INTRODUCTION

This petition presents a vital set of issues in First Amendment doctrine. The court of appeals held that speech addressing matters of public concern is entitled to *no* First Amendment protection if the speakers "acted *substantially* out of economic motivation." App. 26a (emphasis in original). That far-reaching holding is inconsistent with the well-considered views of other courts, and bodes ill for First Amendment jurisprudence. As the Fifth Circuit recognized, the speech at issue "touched on the type of issues that are at the heart of First Amendment protections." *Id.* at 21a-22a. By holding that speech at the core of the First Amendment can be deemed "commercial" and thereby deprived of constitutional protection, the court of appeals cut a sizeable hole in that Amendment's protections. This approach, moreover, necessitates an intrusive inquiry into speakers' motives that is wholly inconsistent with the First Amendment. Our system of free expression is designed to *protect* the freedom and privacy of conscience, not *violate* it.

The court of appeals reached its result through two pivotal rulings. The Fifth Circuit first held that the speech at issue is "commercial" if the speakers "acted *substantially* out of economic motivation." App. 26a (emphasis in original). This holding reflects the growing uncertainty and confusion in this Court's jurisprudence regarding the definition of "commercial" speech. That confusion has now led to a square conflict between the circuits, as the Fifth and Seventh Circuits have followed different tests and reached different results in indistinguishable cases.

To compound the First Amendment injury, the court of appeals went on to hold that "commercial" defamation is entitled to *no* constitutional protection, even when, as here, it involves a public figure and a matter of public importance. That conclusion is in conflict with this Court's defamation precedents. The Fifth Circuit's contrary holding stems once again from this Court's wavering jurisprudence on the

constitutional status and treatment of "commercial speech." The court of appeals' ultimate conclusion that "actual malice" protections turn on the motive of the speaker is also in conflict with holdings of the Seventh and Tenth Circuits.

This Court's review is needed to bring clarity and uniformity to this important area of constitutional law.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 242 F.3d 539 and reprinted in the Appendix ("App.") at 3a-55a. The unreported order denying the petition for rehearing and rehearing *en banc* is reprinted at App. 57a-58a. The district court's unpublished judgment is reprinted at App. 1a.

JURISDICTION

The court of appeals entered judgment on February 14, 2001. Petitioners filed timely petitions for rehearing and rehearing *en banc*, which were denied on April 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent portions of the First Amendment to the United States Constitution, the Lanham Act, and the Texas Business and Commerce Code are reprinted at App. 59a-60a.

STATEMENT OF THE CASE

A. The Satanism Rumor

A rumor surfaced in the late 1970s associating P&G with Satanism. A common form of the rumor is that the president of P&G revealed on a national television talk show that he is associated with the Church of Satan, that a substantial portion of P&G's profits is donated to the Church of Satan, and that he saw no harm in making those disclosures because there are no longer enough Christians left in the United States for his admissions to make a difference. *See* App. 4a.

For more than two decades, this well-traveled rumor has, in the words of the Fifth Circuit, "plagued" P&G. App. 4a. It has been chronicled in books, magazines, newspapers, and other media, including the *Wall Street Journal, The New York Times, Newsweek, Time Magazine, USA Today*, CNN, and national television networks. *See* DX 325, 331, 344, 346.[1] P&G "offered no proof that Amway originally started the rumor." App. 5a. To the contrary, the rumor's origin is unknown. *See id.* at 4a-5a; DX 70, 198.

In the early 1980s, P&G initiated a national media campaign in an attempt to refute the rumor. *See* R30/502-04, 31/748; DX 180. As part of that campaign, P&G distributed "truth kits" to the public, instituted litigation, and issued press releases concerning the rumor and associated litigation. *See* R31/674; DX 54, 199, 227, 243. P&G solicited letters from prominent religious figures, established a toll-free hotline, and used its access to the media to orchestrate reports denying the rumor. *See* R31/674; DX 94-95.

P&G's response only fueled the rumor. *See* DX3. Calling P&G's efforts a "bomb," *Advertising Age* opined that the "principal effect" of P&G's efforts was "to increase awareness of the rumors." *Id.* As early as 1986, P&G's public relations firm advised P&G that the rumor would never go away. *See* DX79.

B. The Defendant Distributors

In April 1995, defendant-petitioner Randy Haugen, an independent distributor of Amway products, received a voicemail that repeated a version of the Satanism rumor. Mr. Haugen then forwarded the voicemail – only to other distributors – through a telephone message system known as AMVOX. *See* App. 5a.

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[1] PX and DX refer to plaintiffs' and defendants' exhibits, respectively. Rxx/yy refers to the trial court transcript, volume xx, page yy.

As the Fifth Circuit explained, "[t]here is no evidence that Haugen knew the rumor was false when he spread it; in fact, he testified that he believed it to be true." App. 7a. Days after he sent the voicemail at issue, Mr. Haugen sent a retraction via AMVOX asking the other distributors not to "talk about it anymore" because "[w]e do not think that it happened." *Id.* at 7a & n.4. At Amway's request, he later sent a second, more detailed retraction. *See id.* at 7a.

C. The District Court Proceedings

P&G filed this action against Amway and certain independent distributors asserting that Amway and the distributors damaged P&G's reputational and economic interests by disseminating the rumor. The complaint alleged claims for common-law defamation and violation of three statutes: the Lanham Act, 15 U.S.C. § 1125(a); RICO, 18 U.S.C. § 1962; and Texas Business and Commerce Code section 16.29. *See* App. 10a. P&G also pursued claims for disparagement of Crest toothpaste and alleged operation of a pyramid scheme. *See id.* Jurisdiction was predicated on both diversity of citizenship and the federal questions presented by the Lanham Act and RICO claims. *See* 28 U.S.C. §§ 1331 & 1332.

Following a two-week trial, the district court granted judgment as a matter of law in favor of Amway and the distributors. The court noted that the rumor "started 20 years ago, before Haugen was ever even thought about." R37/2185. The district court also found that the public had engaged in an ongoing discussion of the rumor for decades. *See id.*; DX 3, 32-34, 36-37, 81, 359. P&G did not dispute that point: the former CEO of P&G, John Smale, testified at trial that the rumor was a matter of "public concern" before Haugen repeated it in 1995. R30/372-73, 31/569-70. Accordingly, the court held that the Satanism rumor was a matter of public concern, and that P&G was a limited-purpose public figure concerning the rumor. *See* App. 12a & n.9.

Based on those conclusions, the district court held that P&G could recover for damage to its reputation only if it proved that the distributors had acted with "actual malice" in repeating the rumor, *i.e.*, had done so with knowledge or reckless disregard of its falsity. *See* App. 12a. Because P&G had not presented any evidence of actual malice, the court granted judgment as a matter of law on P&G's Lanham Act claim. *See id.* The court also dismissed P&G's other claims. *See id.*

D. The Court of Appeals Decision

The Fifth Circuit affirmed in part and reversed in part. The court concluded that the Satanism rumor "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. The court also accepted the district court's holding that "P&G is a limited-purpose public figure with regard to the Satanism rumor" because P&G had waived that point on appeal. *Id.* at 31a.

Nonetheless, the court of appeals reversed the district court's judgment on the Lanham Act and Texas Business and Commerce Code claims. *See* App. 52a, 54a. The court first considered whether the speech at issue is "commercial speech" under a balancing test announced by this Court in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *See* App. 24a. With respect to the first *Bolger* factor, which is "whether the speech is an advertisement," the court recognized that "the repetition of the rumor via AmVox was not an advertisement in the classic sense." *Id.* at 25a. The Fifth Circuit held, however, that "whether it could be considered as a negative advertisement against P&G seems to depend on the determination of the third factor – whether the speaker had an economic motivation for the speech." *Id.* The court also held that the second *Bolger* factor, namely, "whether the communication refers to a specific product or service," is satisfied because "the message did refer to specific products of *P&G's*." *Id.* at 24a-25a (emphasis added). After stating that "the speech here does not sort cleanly into either category:

commercial or noncommercial," the Fifth Circuit held that if "the speaker acted *substantially* out of economic motivation," the speech is commercial. *Id.* at 24a, 26a (emphasis in original). Thus, the court remanded for a jury determination on that issue. *See id.* at 25a.

The court of appeals then held that if the speech is commercial, it is entitled to "no protection" under the First Amendment. App. 34a. The court therefore rejected the argument that public figure P&G must prove "actual malice." *Id.* It also considered and rejected the possibility of applying an intermediate level of protection to commercial defamation. *See id.* at 36a-38a. The Fifth Circuit recognized that the arguments in favor of doing so are "compelling," but concluded that it was "prevent[ed]" by this Court's precedents from according any constitutional protection to false commercial speech. *Id.* at 33a, 36a.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF OTHER COURTS IN HOLDING THAT "THE MOTIVATION OF THE SPEAKER IS DETERMINATIVE" OF WHETHER THE SPEECH IS "COMMERCIAL SPEECH."

The court of appeals' holding that speech regarding "issues that are at the heart of First Amendment protections" may be deemed "commercial speech" (and thus subjected to reduced protection) would work a radical transformation of First Amendment jurisprudence. It reflects, however, the uncertainty among the lower courts with respect to the definition of "commercial speech." Especially given the important and recurring nature of this issue, this Court's guidance is needed to bring clarity to this important arena of First Amendment jurisprudence.

A. The Fifth Circuit's Decision Highlights the Need for this Court to Reconcile Its Precedents on the Definition of "Commercial Speech."

This Court has announced at least three different tests for determining whether speech is "commercial." The Court has "usually defined" commercial speech as "speech that does *no more* than propose a commercial transaction." *United States v. United Foods, Inc.*, No. 00-276, 2001 WL 703953, at *3 (U.S. June 25, 2001) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (emphasis added). The Court has deemed the distinction between speech that merely proposes a commercial transaction and other types of speech to be a "commonsense" one. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). This Court employed yet a third test in *Bolger* by considering three factors: whether the communication was an advertisement; whether it referred to a specific product or service; and whether the speaker had an economic motivation for the speech. 463 U.S. at 66-68. The *Bolger* Court indicated that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

This Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use

that definition in either *Bolger* or in [*Board of Trustees v. Fox*, 492 U.S. 469 (1989)] . . . . In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech."

City of Cincinnati v. Discovery Network, 507 U.S. 410, 422-23 (1993) (emphasis in original; citations omitted). The Court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

Lower courts and commentators have expressed frustration with the long-continuing uncertainty. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc., v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that this Court's "attempts to define 'commercial speech'" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 831-32 (1999); *see also* Laurence H. Tribe, *American Constitutional Law* 896 (2d ed. 1988) ("[T]he Court's blithe admonition that the difference between commercial and non-commercial speech is determined by 'commonsense' has not provided reliable guidance for the resolution of individual cases."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 5 (2000) (noting that the "boundaries" of commercial speech are "quite blurred").

B. The Fifth Circuit's Decision Conflicts with Decisions of Other Courts of Appeals by Relying on Subjective Motivation.

This Court's indeterminate precedents have inevitably led to a conflict in the circuits. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of

the *Central Hudson* test," "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does no more than propose a commercial transaction." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998). In doing so, the Seventh Circuit, speaking through now-Chief Judge Flaum, stressed "the incredible breadth of the *Central Hudson* test if taken to its literal extremes," and noted that this Court "has not offered any nuanced distinctions between the two standards." *Id.* at 684. Accordingly, the Seventh Circuit held that speech which "do[es] not propose a commercial transaction between [the speaker] and a specific customer" is "not commercial speech." *Id.* at 686.

Similarly, the Ninth Circuit determined that this Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]." *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). It then limited commercial speech to the traditional test: "This simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia Pharmacy*, 425 U.S. at 762). Although the court later granted *en banc* review, the 11-member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains "persuasive authority" in the Ninth Circuit (though not controlling authority). *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999). *Thomas* also starkly illustrates the difficulty faced by the lower courts in attempting to reconcile this Court's precedents.

In contrast to these cases, the Fifth Circuit decision below employs a loose variant of the *Bolger* test. With respect to the first *Bolger* factor, which is "whether the speech is an advertisement," the court of appeals recognized that "the

repetition of the rumor via AmVox was not an advertisement in the classic sense." App. 25a. The court held, however, that "whether it could be considered as a negative advertisement against P&G seems to depend on the determination of the third factor – whether the speaker had an economic motivation for the speech." *Id.* The court of appeals also held that the second *Bolger* factor – "whether the communication refers to a specific product or service" – is satisfied because "the message did refer to specific products of *P&G's*." *Id.* at 24a-25a (emphasis added). The court then concluded that "if the speaker acted *substantially* out of economic motivation," the speech is commercial. *Id.* at 26a (emphasis in original). The upshot is that speech is commercial if it (1) references a product of a competitor, and (2) has a substantial economic motivation. The Fifth Circuit purported to qualify that holding by stating that other circumstances could be considered, but the court did not identify any such circumstances. *See id.* at 27a.

The Fifth Circuit's *Bolger*-informed analysis cannot be reconciled with the traditional *Virginia Pharmacy* test, as interpreted by the Seventh and Ninth Circuits. As the Fifth Circuit acknowledged, the speech at issue here is "not an advertisement in the classic sense." App. 25a. Mr. Haugen did not "propose a commercial transaction between [the speaker] and a specific customer." *Commodity Trend Service*, 149 F.3d at 686. Nor did he say anything resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Instead, Mr. Haugen spoke about a competitor's religious affiliation, in an "intracorporate" setting, without mentioning any specific Amway products or offering any prices or terms of sale. By holding that such speech is "commercial" if undertaken for profit, the court of appeals ruled in conflict with the much narrower interpretations of the Seventh and Ninth Circuits.

The Seventh Circuit's decision in *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986), puts this conflict in bold relief. In *Woods*, a television station owner sued a newspaper for defaming him, in part by "misrepresenting his religious

beliefs." *Id.* at 483. The plaintiff argued that the defendants' speech was "commercial speech" because he was "a competitor of the Defendants and much of what the Defendants published concerns the Plaintiff's competitive posture." *Id.* at 483-84 (internal quotation omitted). The Seventh Circuit disagreed, and held that the speech "simply cannot be characterized as commercial speech" because it "clearly is not advertising by any stretch of the imagination." *Id.* at 484. The court also stressed that it is "immaterial" whether "the defendants may have profited" from the speech. *Id.* at 484.

The Seventh Circuit's holding cannot be reconciled with the decision below. Under the Fifth Circuit's analysis, the speech at issue in *Woods* is "not an advertisement in a classic sense," but "could be considered as a negative advertisement against" the competitor. App. 25a. The speech also "refer[red] to specific products" of the speaker's competitor (its news broadcasts). *Id.* No other circumstances distinguish the cases, since it has long been settled that individuals like Mr. Haugen enjoy the same First Amendment protections as the news media. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Thus, under the Fifth Circuit's test, the Seventh Circuit should have remanded for factfinding on motive. Instead – and in conflict with the Fifth Circuit's current methodology – the Seventh Circuit eschewed any consideration of motive, employed the traditional *Virginia Pharmacy* test, and held that the speech is not commercial as a matter of law.[2]

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[2] This conflict is present not only among the circuits, but also within the Tenth Circuit. One Tenth Circuit panel held that "commercial speech is best understood as speech that *merely advertises* a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (emphasis added). Because the speech at issue in that case did not "merely advertise" a product, it was "not transformed into commercial speech merely because [it was] sold for profit." *Id.* Without citing *Cardtoons*, however, a different panel later used the

(continued...)

C. The Fifth Circuit's Decision Subjects Speech at the Core of the First Amendment to Reduced Protection and Discriminates Among Speakers.

Beyond the need to resolve the circuit conflict and reconcile this Court's precedents, this case presents important First Amendment issues that cry out for review in their own right. "Commercial speech" jurisprudence has typically focused on advertising, not on speech that could be called "commercial" in a broader sense. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495-500 (1996) (plurality opinion). Not even all advertising is "commercial speech." *See Bolger*, 463 U.S. at 66 ("The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech."). By focusing on the speaker's motivation, the Fifth Circuit expanded the "commercial speech" doctrine far beyond its advertising moorings.

In First Amendment cases, this Court has a unique "role in marking out the limits of the [constitutional] standard through the process of case-by-case adjudication." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984). Especially when lower courts have held speech to be completely unprotected by the First Amendment, the Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

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[2] (...continued)
Bolger test to hold that Mr. Haugen's voicemail is "commercial speech" (albeit based in part on the conclusion that arguments raised in this case were not preserved in that case). *See Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1274-75 (10th Cir. 2000). This intracircuit inconsistency on the test for determining whether speech is "commercial" further confirms the need for this Court's guidance.

The need for this Court to review decisions restricting core First Amendment freedoms is especially exigent in light of the increasingly nationwide nature of speech. National and multinational companies routinely distribute information on a nationwide or international basis. Thus, they are effectively bound by the law of the least-protective circuit. If the Fifth Circuit punishes speech, nationwide speakers are precluded, as a practical matter, from disseminating it at all. Perhaps for that reason, this Court has previously granted *certiorari* in commercial speech cases based solely on the importance of the issues presented. *See, e.g., Discovery Network*, 507 U.S. at 415-16; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 574, 576 (1988). The issues presented here are especially important. The court of appeals subjected speech on a religious topic to reduced protection, and discriminated among speakers based on an intrusive inquiry into their subjective motivations.

1. The Fifth Circuit Subjected Speech at the Core of the First Amendment to Reduced Protection.

By classifying speech at the core of the First Amendment as "commercial speech," the court of appeals undermined vital First Amendment values. Commercial speech has generally received less protection than other speech because it "has been thought less valuable than" other types of speech. App. 18a. In light of this rationale, this Court has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Otherwise, core political speech could be deemed "commercial" and relegated to the less searching scrutiny reserved for "less important" speech.

That is exactly what the Fifth Circuit did here. The court of appeals recognized that the speech at issue "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. Yet it held that the speech could be deemed commercial. The court attempted to

rationalize that counterintuitive result by quoting *Bolger* for the proposition that "*advertising* which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 34a (emphasis added). But that point begs the question whether the communication is an advertisement in the first place. In *Bolger*, a prophylactic manufacturer sent out pamphlets extolling the virtues of condoms in preventing disease. *See* 463 U.S. at 66 n.13. The Court explained that simply because "a product is referred to generically does not . . . remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names." *Id.*

In this case, Mr. Haugen's voicemail did not promote Amway's products by reference to their virtues. Nor did it say that P&G's products were of inferior quality. Instead, Mr. Haugen forwarded a voicemail, which focused on P&G's relationship with Satanism, to other distributors. The motivation behind such speech has no bearing on its importance. If a defense contractor thinks that another contractor is selling weapons to the enemy, people ought to know. If a company thinks that another company is supporting the Klu Klux Klan or the Communist Party or a terrorist organization or the Church of Satan, people ought to know. Here, Mr. Haugen forwarded the voicemail only to other distributors. Yet the Fifth Circuit would deprive his speech of First Amendment protection.

That is not the intent of the "commercial speech" doctrine, which has "usually" been held to target "speech that does *no more* than propose a commercial transaction." *United Foods*, 2001 WL 703953, at *3 (emphasis added). Thus, this Court held that a newsletter issued by a corporation was not "commercial speech" because it "extend[ed] well beyond speech that proposes a business transaction." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9

(1986) (plurality opinion). Similarly, charitable solicitations are not "commercial speech" because the charitable message and the request for funds are "inextricably intertwined." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *accord Virginia Pharmacy*, 425 U.S. at 761. So too here, the voicemail does much "more than propose a commercial transaction." *United Foods*, 2001 WL 703953, at *3. In view of the "intracorporate" nature of the communication, it can hardly be said to propose a transaction at all.[3]

2. The Fifth Circuit Undermined First Amendment Values by Discriminating Among Speakers.

The Fifth Circuit compounded the First Amendment injury by placing "determinative" reliance on the speaker's motive. App. 24a, 27a. That holding is both inconsistent with this Court's precedents and affirmatively harmful to First Amendment values.

This Court has repeatedly explained that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). "That books, newspapers and magazines are . . . sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *see also New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the [defamatory] advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."). Indeed, "[i]f a profit motive could somehow strip

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[3] Similarly, fliers that were separately disseminated by other independent distributors, none of whom are defendants in this case, asked readers to "[i]nform other Christians about this. Stop buying Procter & Gamble products and let's show the President of Procter & Gamble that there are far [sic] enough Christians to make a difference." PX1537A. Thus, the fliers closely resemble consumer boycotts and charitable solicitations.

communications of the otherwise available constitutional protection, [this Court's] cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667 (1989). Thus, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-194 (1999).

By departing from those principles, the Fifth Circuit would substantially diminish First Amendment protections. Instructing juries on which speech is worthy of protection "has not, in and of itself . . . served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose*, 466 U.S. at 505. Accordingly, this Court has stressed the need to prevent juries from nullifying the First Amendment protections of unpopular speakers. *See, e.g., id.* at 505-511; *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966). Under the decision below, however, First Amendment freedoms would be subject to a jury's assessment of the speaker's motives. The result is an open invitation to eviscerate First Amendment protections precisely when they are most needed – when the speech is unpopular.

The court of appeals itself illustrated the arbitrariness of its speaker-based approach. In particular, the court said that an owner of a religious bookstore who described rock music as being influenced by the devil would be protected if she had a "primarily religious, rather than economic, motivation for her speech." App. 26a n.28. But if she is "agnostic and opened the bookstore only after a case study . . . showed that Christian bookstores can be extremely profitable," then her speech would likely be commercial. *Id.* In either event, however, her message would have exactly the same value to public discourse. It makes no sense for First Amendment protections to turn on her subjective motives, especially since doing so would enable a potentially hostile jury to punish her for that reason alone.

Consider the speech in this very case. If a minister quoted the voicemail from the pulpit, his speech would obviously be religious in nature. But if he were a part-time distributor of Amway products, the Fifth Circuit would subject him to cross-examination as to his motives. Similarly, individuals who organize consumer boycotts address important political issues. But if a jury found that they acted out of economic motivations, they could be sent to jail. If the original owners of Ben & Jerry's gave their employees a pep talk by describing the evils of their capitalist competitors, they would be subject to suit under the "commercial speech" doctrine. A news station that gave a negative review to a musician might also be sued if its parent corporation owned a competing recording studio. The Fifth Circuit appeared to recognize this problem, for it stated in an unsupported footnote that similar speech by unions might not be "commercial." *See* App. 27a n.30. But it did not (and could not) provide any principled basis for distinguishing that situation from this one.

The court of appeals' reliance on subjective motivation is also perverse, because it requires a speaker to endure an intrusive invasion of his freedom of conscience in order to invoke the First Amendment. That Amendment is supposed to vindicate the freedom of conscience, not violate it. Compelled disclosures of political contributions and organizational membership lists are subjected to "[e]xacting scrutiny" precisely because such "invasion of privacy of belief" runs afoul of First Amendment values. *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976); *see also, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958). Yet the Fifth Circuit would require precisely that invasion as the price for invoking the First Amendment. The Amendment would be turned against itself.

II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF OTHER COURTS IN HOLDING THAT "COMMERCIAL" DEFAMATION IS NOT ENTITLED TO PROTECTION.

If the speech at issue is "commercial," the next question is whether that status renders the speech less deserving than other defamatory speech of constitutional protection. This Court has long held that the applicable level of protection turns on whether the plaintiff is a public official or public figure, and whether the speech addresses a matter of public concern. The Fifth Circuit would now ignore that test and subject "commercial" defamatory speech to strict liability. That holding is in conflict with this Court's defamation precedents. It again reflects, however, the lingering uncertainty caused by this Court's precedents on the level of protection accorded to "commercial" speech.

A. The Fifth Circuit's Holding Is Inconsistent with this Court's Defamation Precedents.

This Court has "consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (quoting *New York Times*, 376 U.S. at 279-80). Further, the Court has confirmed that this holding applies to all communications on a matter of public concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion). These precedents control this case for three reasons.

First, there is no question that P&G is a limited-purpose public figure with respect to the Satanism rumor. P&G aggressively asserted itself into the controversy by launching a media campaign against the rumor – an effort that backfired and actually fanned the rumor. *See* page 3, above. The district

court accordingly concluded that P&G is a limited-purpose public figure in this respect, and the court of appeals held that P&G is bound by that determination. *See* App. 30a-31a.

Second, there can be no doubt that the communication concerns matters of public concern. As the Fifth Circuit explained, the speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. Because of its importance, the rumor was widely disseminated more than a decade before Mr. Haugen forwarded the voicemail. *See id.* at 4a-5a.

Third, there is no question that P&G is seeking to hold Amway and certain distributors liable for damage to its reputation caused by the Satanism rumor. This Court has stressed that a plaintiff cannot circumvent *New York Times* by suing for damage to reputation under a cause of action other than state-law defamation. *See Hustler*, 485 U.S. at 56-57. In this case, P&G sued under state defamation law; the Lanham Act, 15 U.S.C. § 1125(a), which provides a cause of action for "commercial defamation," *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 111 (6th Cir. 1995); and section 16.29 of the Texas Business and Commerce Code, which authorizes suit to protect the plaintiff's "business reputation." P&G did not appeal the dismissal of its state-law defamation claim, but now seeks to recover the same damages under the federal and state statutes. That is precisely what *Hustler* prohibits. *See, e.g.*, *Moldea v. New York Times Co.*, 22 F.3d 310, 319 (D.C. Cir. 1994).

Given that all of the criteria for application of the "actual malice" standard are satisfied, the Fifth Circuit's "commercial speech" distinction is no distinction at all. In *Dun & Bradstreet*, this Court faced the question whether economic speech about a public figure was entitled to reduced protection. A plurality of the Court explained that "speech on matters of public concern . . . is at the heart of the First Amendment's protection." 472 U.S. at 758-59 (internal quotations omitted). Thus, the Court held that whether speech is entitled to full

protection under *New York Times* turns on whether it addresses "matters of public concern" or "matters of purely private concern." *Id.* In dissent, four Justices stressed that speech on a matter of public concern should not receive reduced protection merely because it is "commercial." *Id.* at 794 (Brennan, J., dissenting). The plurality appeared to agree by clarifying that it did "not hold . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech," but instead held it to reduced protection inasmuch as it did not address a matter of public concern. *See id.* at 762 n.8. Because the speech at issue involves "matters of public concern," it "is at the heart of the First Amendment's protection" under *Dun & Bradstreet*. *Id.* at 758-59. Thus, it is irrelevant whether the speech is also "commercial."

This conclusion is only confirmed by the Fifth Circuit's analysis. The court of appeals noted that false commercial speech has no constitutional value. *See* App. 19a. But commercial speech is no different than other speech in that respect. This Court's defamation jurisprudence has long recognized that *all* "[f]alse statements of fact are particularly valueless." *Hustler*, 485 U.S. at 52. Nonetheless, such falsehoods are protected, not for their own sake, but because they are "inevitable in free debate." *Id.* (internal quotation omitted). "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Welch*, 418 U.S. 323, 341 (1974).

That rationale applies with full force to commercial speech, because it is well-settled that truthful commercial speech has constitutional value, and should therefore be encouraged. *See, e.g., Virginia Pharmacy*, 425 U.S. at 763-64. Commercial speech, like speech on other matters of public concern, contributes to the marketplace of ideas and not simply the market for goods. *See United Foods*, 2001 WL 703953, at *3; *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life,

provides a forum where ideas and information flourish."). Indeed,

> [a]dvertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market.... [C]ommercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

44 Liquormart, 517 U.S. at 495.

As Second Circuit Judge Robert D. Sack summarized in his treatise:

> [T]here is growing recognition by the Supreme Court of the constitutional value of truthful and nonmisleading commercial speech; there is potentially greater chilling effect on such speech from common-law remedies than from direct governmental regulations of commercial speech; and commercial speech has special attributes that make the state interest in protecting plaintiffs against inaccurate speech arguably *less* important in the commercial context. There is therefore no basis for departing from traditional First Amendment analysis in considering commercial defamation claims, and the "actual malice" standard should apply in commercial libel cases in the same manner and under the same circumstances as it applies in cases involving noncommercial speech.

Robert D. Sack & Cameron DeVore, *Advertising and Commercial Speech: A First Amendment Guide* §7:2.1 (1999); *accord* John Charles Ulin, Comment, *First Amendment Crossroads – Extending Constitutional Defamation Protection to Commercial Speech*, 39 U.C.L.A. L. Rev. 633, 673-689 (1992).

B. The Fifth Circuit's Holding Reflects the Uncertainty Created by this Court's "Commercial Speech" Jurisprudence.

The court of appeals' contrary holding reflects the deepening confusion spawned by this Court's "commercial speech" jurisprudence. In Section I.A, above, we addressed the uncertainty that has resulted from this Court's use of multiple tests for determining whether speech is "commercial." The Court has also "followed an uncertain course" in determining what level of protection to accord speech that it has determined to be commercial. *Lorillard Tobacco Co. v. Reilly*, Nos. 00-596 & 00-597, 2001 WL 721016, at *32 (U.S. June 28, 2001) (Thomas, J., concurring in part and in judgment). In some cases, this Court has held, consistent with *Dun & Bradstreet*, that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501; *see also, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and noncommercial speech"). But in other cases (and especially in older cases) this Court has held the "commercial speech" label dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

This Court's most recent precedents have only added to the uncertainty. In *United Foods*, this Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 2001 WL 703953, at *3 (citing opinions of Stevens and Thomas, J.J.). But the Court concluded that it "need not enter into the controversy" because the restriction at issue could not be upheld under any standard. *Id.* In *Lorillard*, the Court recognized that a *majority* of the Justices have criticized *Central Hudson*, but again concluded that the traditional test sufficed for purposes of that case:

> Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. *See, e.g.*, [*Greater New Orleans*, 527 U.S. at 197] (Thomas, J., concurring in judgment); [*44 Liquormart*, 517 U.S. at 501, 510-514] (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

2001 WL 721016, at *19; *see also id.* at *30 (Kennedy, J., joined by Scalia, J., concurring in part and in judgment) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it"); *id.* at *32 (Thomas, J., concurring in part and in judgment) ("there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

The instability in this Court's wavering jurisprudence may account for the Fifth Circuit's departure from the *New York Times* line of cases. The court of appeals agreed that there is a "compelling" argument that commercial defamation deserves at least some constitutional protection. App. 36a. The court concluded, however, that "*Central Hudson, Bolger, and Zauderer [v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985)], combined with the Court's plain statements that false commercial speech receives no protection, foreclose us from importing the actual-malice standard from defamation into the law of false commercial speech." *Id.* at 34a-35a (footnote omitted).

The court of appeals got it backwards. As explained in Section A, above, this is a defamation case controlled by the

"actual malice" standard of *New York Times* and *Dun & Bradstreet*. It was the Fifth Circuit that "import[ed]" inapposite commercial speech principles into the law of defamation. Each of the three cases cited by the court of appeals addressed a government restriction on *advertising*; none of them addressed a private civil lawsuit based on *defamation*, and therefore none of them "forelose[d]" the court from applying this Court's controlling defamation precedents.

C. The Fifth Circuit's Holding Conflicts with Decisions of Other Courts.

The Fifth Circuit's misapprehension of this Court's commercial speech jurisprudence brought it into conflict with decisions of other courts. At least two courts have squarely rejected the "novel argument that a plaintiff need not demonstrate that a defendant acted with malice when a defendant's statement is contained in commercial speech." *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. at 645; *see also Q-Tone Broad. Co. v. MusicRadio of Md., Inc.*, No. 93C-09-021, 1995 WL 875438 (Del. Super. 1995). Similarly, the Ninth Circuit has assumed that the *New York Times* standard applies equally to "commercial speech" and other speech. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694 n.4 (9th Cir. 1998) (discussing the "actual malice" test in the context of pure advertising).[4]

The combination of the Fifth Circuit's two holdings also conflicts with decisions of other courts of appeals. The Seventh Circuit held in *Woods*, before considering whether the speech was commercial, that "it is immaterial to the application of the qualified constitutional privilege [of actual malice] that the

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[4] In contrast, the Third Circuit has held, based on "the novel facts" of the case before it, that the "actual malice" standard was inapplicable because the speech was commercial. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 931-32 (3d Cir. 1990). In that case, however, the plaintiff was not a limited-purpose public figure, *see id.* at 938-39, and the speech at issue was a "comparative advertising war." *Id.* at 917.

defendants may have profited from the publication at issue." 791 F.2d at 484. The Tenth Circuit has likewise held that "[t]he focus of the analysis, in determining whether actual malice is required, must be on the subject of the speech, not on the identity of the speaker." *Garcia v. Board of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985). While *Garcia* arose in a different context (the question in that case was whether nonmedia defendants are entitled to the same protections as media defendants), the court's ultimate conclusion that "the identity of the speaker" is irrelevant, *id.*, cannot be reconciled with the Fifth Circuit's focus on the identity and subjective motivation of the speaker. Similarly, the Eighth and Ninth Circuits have applied the *New York Times* test to Lanham Act claims brought against defendants who stood to gain financially from the allegedly defamatory speech. *See Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119 (8th Cir. 1999) (holding that plaintiff who brought claim against competitor based on false advertising was not a limited-purpose public figure); *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251 (9th Cir. 1997) (holding that "public figure" could recover from tabloid "only by proving 'actual malice'"). By holding that the applicability of the "actual malice" protection turns on the identity and subjective motivation of the speaker, rather than on whether the speech involves a matter of public concern regarding a public figure, the Fifth Circuit's decision conflicted with the holdings of the Seventh and Tenth Circuits and the analyses of the Eighth and Ninth Circuits.

D. The Fifth Circuit's Holding Undermines Our Constitutional Commitment to Vigorous Debate on Matters of Public Importance.

The importance of "actual malice" protections alone warrants *certiorari*. In both *New York Times* and *Hustler*, this Court granted *certiorari* "[b]ecause of the importance of the constitutional issues involved." *New York Times*, 376 U.S. at 264; *see also Hustler*, 485 U.S. at 50. The same constitutional values are at stake in this case.

This Court recently reaffirmed "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'" *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1765 (2001) (quoting *New York Times*, 376 U.S. at 270). This commitment is based on the principle that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *New York Times*, 376 U.S. at 270 (internal quotation omitted). Yet the Fifth Circuit would depart from this principle whenever speech is found to be "commercial."

That conclusion leaves First Amendment freedoms hanging by far too slender a thread. No matter which test is used to determine whether speech is "commercial," this Court has noted that the inquiry is at best "a matter of degree." *Discovery Network*, 507 U.S. at 423. Justice Thomas was more blunt: "I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*, 2001 WL 721016, at *32 (Thomas, J., concurring in part and in judgment); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (commenting on the "artificiality of a rigid commercial/non-commercial distinction"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) ("the commercial/noncommercial distinction makes no sense"). In this very case, the Fifth Circuit candidly opined that "the speech here does not sort cleanly into either category: commercial or noncommercial." App. 24a.

Under the Fifth Circuit's holding, however, a distinction that is at best a minor difference in degree turns into a major difference in kind. If speech is not commercial, it is entitled to full First Amendment protection. But if it is commercial, it is entitled to *no* protection at all. Even in the context of speech regarding *private* matters, this Court has not permitted such a sharp disparity in treatment. Instead, speech on private matters regarding public figures is entitled to an intermediate level of protection between "actual malice" and strict liability. *See*

Gertz, 418 U.S. at 347. The Fifth Circuit, in contrast, would accord *no* protection to speech regarding matters of *public* importance and *public* figures if the speech is also commercial. As the *National Life* court stressed, "[i]n using the mere identification of commercial speech as the analytic tool, Plaintiff operates with a meat cleaver instead of a scalpel, and would amputate much of the core of protected speech from the body of the First Amendment." 793 F. Supp. at 646.

This point is especially pronounced in light of the Fifth Circuit's expansive definition of commercial speech. When that court's two holdings are combined, speech at the *core* of the First Amendment can be deemed "commercial" based on the speaker's motivation, and then deprived of all First Amendment protection for that reason alone. This result makes no sense, given that "what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker." *Florida Bar*, 515 U.S. at 636-37 (1995) (Kennedy, J., joined by Stevens, Souter, and Ginsburg, J.J., dissenting). *New York Times* itself involved a paid advertisement that was placed in part for financial reasons – the solicitation of funds. *See* 376 U.S. at 256-57. Nonetheless, the advertisement was core political speech that hardly warranted lesser treatment based on its financial motivation.

In combination, the court of appeals' holdings would also mean that many speakers who stood to profit from their speech could not accurately predict whether a judge or jury would later conclude that they deserved First Amendment protection. Such uncertainty would "inhibit the exercise of [First Amendment] freedoms" by "inevitably lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation omitted). By doing so, it would undermine our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times*, 376 U.S. at 270.

The Fifth Circuit recognized the force of these points, but felt bound by this Court's commercial speech jurisprudence. *See* App. 33a-34a. This Court's guidance is therefore needed on this important First Amendment issue.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE PROCTER & GAMBLE COMPANY, et al	§	
Plaintiffs,	§	
versus	§	CIVIL ACTION
	§	No. H-97-2384
AMWAY CORPORATION, et al	§	
Defendants.	§	

AMENDED FINAL JUDGMENT

On the 3rd day of May, 1999, the above-styled and numbered case came on for trial. Both sides appeared and announced ready for trial, and the case was tried to a jury, one having been timely requested, from May 3 to May 14, 1999.

The Court enters a final judgment in this case in favor of Defendants and against Plaintiffs pursuant to the findings that the Court made on the record. Accordingly, the Court **ORDERS** that Plaintiffs take nothing from Defendants.

This Order is a **FINAL JUDGMENT**.

Signed this 17th day of May, 1999.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20590

The Procter & Gamble Company

and

The Procter & Gamble Distributing Company,

Plaintiffs-Appellants,

v.

Amway Corporation, et al.,

Defendants,

Amway Corporation; The Amway Distributors Association Council; Ja-Ri Corporation; Donald R. Wilson; Wow International, Inc.; Wilson Enterprises, Inc.; Ronald A. Rummel, Individually Doing Business as Rummel Enterprises; Kevin Shinn; Randy Haugen; Freedom Associates, Inc.; Freedom Tools, Inc.; Randy Walker; Walker International Network; Gene Shaw; John & Jane Does 6-10, Business Entities; Dexter Yager, Sr.; Birdie Yager; and D&B Yager Enterprises, Inc.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH and DENNIS,
Circuit Judges, and ROETTGER,*
District Judge.

JERRY E. SMITH, Circuit Judge:

The Procter & Gamble Company ("P&G") appeals the dismissal of its lawsuit against Amway Corporation and other defendants for defamation, fraud, and violations of the Lanham Act, RICO, and Texas state law. We affirm in part, reverse in part, and remand.

I.

P&G, a manufacturer and distributor of numerous household products, has been plagued by rumors of links to Satanism since the late 1970's or early 1980's. The most common variant of the rumor is that the president of P&G revealed on a television talk show that he worships Satan; that many of P&G's profits go to the church of Satan; and that there is no harm in such disclosure, because there are no longer enough Christians left in the United States for such devilish activities to make a difference. The rumor often was circulated in the form of a written flier that listed numerous P&G products and called for a boycott.

P&G has spent considerable time and money unsuccessfully trying to determine the original source of the rumor and to squelch it. P&G has not been able to prove how the rumor began, although it asserts here that the rumor was either started

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* District Judge of the Southern District of Florida, sitting by designation.

or spread by Amway[1] or its distributors in the 1980's. P&G offered no proof that Amway originally started the rumor, but it did offer evidence showing that various Amway distributors spread it in the 1980's. Rather than suing Amway at that time, however, P&G worked with Amway's corporate headquarters, which promised to help stop the rumor.

The rumor re-surfaced on April 20, 1995, when an Amway distributor named Randy Haugen forwarded it to other Amway distributors via a telephone messaging system for Amway distributors known as "AmVox."[2] Haugen is a highly

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[1] Amway manufactures and distributes household products, many of which compete directly with P&G's products. Amway distributes its products in a fairly distinctive manner, however, using a system of direct marketing in which its distributors are recruited as independent contractors into a hierarchical system of distribution. Amway has more than a million distributors around the world, each of whom is encouraged both to sell Amway products directly to consumers (including the distributor's own household) and to recruit others to be Amway distributors.

The distributors earn money both by a percentage of the income from Amway products they personally sell and by a percentage of the income from sales made by every distributor whom they have directly recruited, and by those distributors further "downline" who have been recruited as recruits of recruits. Amway's success depends on the efforts of its distributors to encourage downline distributors to buy Amway products and continually to recruit new distributors to replace those lost to attrition. Amway encourages "upline" distributors to motivate those below them in the hierarchy and downline distributors to "emulate" those distributors above them.

[2] AmVox is a communication system that Amway sells to its distributors to facilitate communication between and among them. Haugen received the rumor about P&G from another Amway distributor via AmVox and forwarded it to all his distributors saying, "This is a great message. Listen to it." The message was:

> Hey, Jeff, this is Roger Patton. I wanted to run something by you real quick that I think you'll find pretty interesting. I was just talking to a guy the other night about this very subject and it just so happens that a guy brings information in, lays it on my desk this morning, so here it goes. It says the president of Procter & Gamble appeared on the

(continued...)

successful Amway distributor with a network of tens of thousands to possibly 100,000 distributors underneath him throughout Utah, Nevada, Texas, Mexico, and Canada. He also served on Amway's Distributors Association Council ("ADAC"), which is an advisory body for Amway distributors. Defendants Freedom Associates, Inc.; Freedom Tools Inc.;

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[2] (...continued)
Phil Donahue Show on March 1st of '95. He announced that due to the openness of our society, he was coming out of the closet about his association with the Church of Satan. He stated that a large portion of the profits from the Procter & Gamble products go to support a satanic church. When asked by Donahue if stating this on television would hurt his business, his reply was there are not enough Christians in the United States to make a difference. And below it has a list of the Procter & Gamble products, which I'll read:

Duncan	Hines	Bounce	Cheer
Bold	Cascade	Joy	
Comet	Folgers	Jif	
Dawn	Crisco	Always	
Downy	Puritan	Attends Undergarments	
Gain	Secret	Oil of Olay	
Mr. Clean	Sure	Wondra	
Oxydol	Head and Shoulders		
Camay	Spic-n-Span	Pert	
Coast	Tide	Prell	
Ivory	Top Job	Vidal Sassoon	
Lava	Luvs	Safegard	
Pampers	Zest	Pepto-Bismol	
Charmin	Scope	Puffs	
Crest	Gleem		

and says if you're not sure about a product, look for the symbol of the ram's horn that will appear on each product beginning in April. The ram's horn will form the 666 which is known as Satan's number. I tell ya, it really makes you count your blessings to have available to all of us a business that will allow us to buy all the products that we want from our own shelf and I guess my real question is, if people aren't being loyal to themselves and buying from their own business, then whose business are they supporting and who are they buying from. Love ya. Talk to you later. Bye.

Randy Walker; and Walker International Network are Amway distributors in Haugen's distribution network.

There is no evidence that Haugen knew the rumor was false when he spread it; in fact, he testified that he believed it to be true. The rumor circulated in his and other distribution networks. Some Amway distributors printed fliers containing the rumor, circulating them to consumers, with a message saying, "We offer you an alternative." The fliers also gave contact information for Amway distributors. Although P&G has received complaints and inquiries about this rumor for the last twenty years, it offered evidence to show that, at the time the rumor was circulating on AmVox, the number of complaints and inquiries increased substantially in the states in which the majority of Haugen's distributors live.[3]

Within days of the initial message containing the rumor, Haugen sent a short retraction via AmVox.[4] Shortly thereafter, an Amway representative contacted Haugen and delivered a copy of a P&G "truth kit," which explains that the rumor is false. The Amway representative asked Haugen to issue another retraction via AmVox. Using the AmVox system, Haugen then sent out a second, more detailed, retraction.[5]

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[3] None of the complaints stated that the complainant had heard the rumor via AmVox.

[4] The retraction stated:

> Hey gang. We sent a message down a while back to do with Procter & Gamble. It cannot be substantiated, that it happened (*drop out on tape*) so I'm going to assume that it didn't actually happen. Um, please do not call Phil Donahue and please do not call Procter & Gamble and just drop it and don't talk about it anymore. We'd just appreciate that a whole bunch. We do not think that it happened. Thank you. Good-bye.

[5] The second retraction stated:

> Hello guys. This message is going out to all of Valerie and I's frontline and also to every diamond in the organization. Uh, we

(continued...)

[5] (...continued)

had an Amvox that came down that talked about Procter & Gamble. A lot of you I understand did not get this Amvox, uh, but if you didn't get it, still pay attention to this because if this rumor ever comes up again you need to stamp it out. Uh, it was rumored that on a television show, on the Phil Donahue show, and it is rumored on other talk shows, that uh, the CEO or officers from Procter & Gamble Company went onto the show and told them that their symbol represents Satanism, the symbol on all their products, and also that they practice Satanism. I'm going to read you a statement here and see if we can get this rumor cleared up because I know a lot of you would like to know the truth and it is very important that you understand this. False rumors: Unfortunately this familiar trademark has been subjected to prosperous, excuse me, preposterous unfounded rumors since 1980-81. The rumors falsely allege that the trademark is a symbol of Satanism or devil worship. Typically the story reports a Procter & Gamble executive discussed Satanism on a national televised talk show. Another story maintains that the trademark is a result of Procter & Gamble being taken over by the Moonies, followers of Reverend Sun Yung Moon and his Unification Church. The rumors are, of course, totally false. Their trademark originated in 1851 as a symbol for their Star brand candle. Later it was designed to show a man in the moon looking over a field of 13 stars commemorating the original American colonies. It represents only Procter & Gamble. So if you hear any rumors saying anything to the effect that they are practicing Satanism and their symbols on their products, uh, are satanic, then it is absolutely 100% false. Uh, we don't want any bad rumors about any competitors or non-competitor, any company anywhere ever going out from us. So if anybody you hear talking about this in the organization anywhere at all brings this up, it is absolutely not true. Not only is not just substantiated, but is not true, period. Amway Corporation does not endorse spreading false and malicious rumors against Procter & Gamble or any other company. Please do your part as independent distributors by not spreading this rumor any farther or nipping it if you hear it from anybody else. We appreciate that a whole lot, uh, so let's crush that, if you're hearing any kind of stuff anywhere let's get rid of it and let's go on and build us a huge business and not

(continued...)

Despite Haugen's retractions, the rumor continued to circulate in Haugen's network and at least one other network for some time.

II.

In response to the spread of the rumor among Amway distributors, P&G filed a lawsuit in each of two federal district courts. In 1995, in Utah, it sued Haugen, Freedom Associates, Inc., and Freedom Tools, Inc., for spreading the Satanism rumor, claiming it lost customers as a result of the actions of Haugen and other Amway distributors. P&G later joined Amway, Randy Walker, and Walker International Network as defendants. In 1996, P&G filed a second amended complaint containing causes of action for defamation, common-law unfair competition, violations of the Utah Truth in Advertising Act, tortious interference, negligent supervision, violations of Lanham Act § 43(a), 15 U.S.C. § 1125(a), and vicarious liability. P&G then filed a third amended complaint alleging that Amway is an illegal pyramid and alleging fraud and product disparagement; that complaint was dismissed in 1997. Later in 1997, P&G filed a motion for leave to file a fourth amended complaint to assert fraud and disparagement claims; the Utah court denied the motion as untimely.

One day after its third amended complaint was dismissed in the Utah action, P&G filed the suit at issue in this appeal, in Texas. This suit is based on the same transactions, and involves substantially the same parties, as does the Utah suit. It names Haugen, Amway Corporation, ADAC, and various other Amway Distributors (all hereinafter referred to as

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[5] (...continued)

> have any of this kind of junk and that's a good lesson to be very, very, very, careful about putting anything down on Amvox that's not substantiated, and if anybody could take the blame on this, I can take it. So, uh, we just don't want anything to do with it and it was a mistake. It did go out to a few people ... (*drop out*).

"Amway") as defendants.[6] The Texas complaint sought remedies for the alleged conduct of defendants in (1) spreading the Satanism rumor, (2) disparaging P&G's Crest toothpaste, and (3) allegedly harming sales of P&G's products by inducing people to become Amway distributors and consumers by luring them into an illegal pyramid scheme and misleading them as to the financial rewards of selling Amway. P&G asserted various causes of action in its Texas suit, including common-law fraud; several violations of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d); and violation of Texas Business and Commerce Code § 16.29.[7]

The Texas district court granted Amway's Fed. R. Civ. P. 12(b)(6) motion dismissing P&G's RICO claim, because P&G did not allege that it had relied on Amway's alleged predicate

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[6] ADAC, Ja-Ri Corporation ("Ja-Ri"), Donald Wilson, WOW International, Inc., Wilson Enterprises, Inc., Ronald Rummel, Kevin Shinn, Gene Shaw, Dexter Yager, Sr., Birdie Yager, and D&B Yager Enterprises (all listed as defendants on P&G's brief) were not defendants in the Utah suit, but, as Amway distributors, they were in privity with the distributors who were defendants there. It is uncertain to what extent P&G is appealing the dismissal of some of these defendants. Although P&G's brief claims error on the part of the district court in the dismissals of ADAC and Ja-Ri, P&G admits in its initial brief that, at the time the court below dismissed the remaining claims, "[t]he remaining defendants were Amway ... Randy Haugen, Randy Walker, Dexter Yager, and Donald Wilson." P&G does not contest the earlier dismissal of any defendants except ADAC and Ja-Ri. WOW International, Inc., Wilson Enterprises, Inc., Ronald Rummel, Kevin Shinn, Gene Shaw, Birdie Yager, and D&B Yager Enterprises are not even mentioned in P&G's initial brief other than on its cover. Thus, P&G either does not appeal their dismissals from the suit or has waived any argument against their dismissals. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.1994).

[7] The only claim that remains on appeal from the Texas case that P&G did not assert in the Utah case is for violation of Texas Business & Commerce Code § 16.29. P&G brought a number of other claims in its initial Texas complaint that it had not raised in the Utah suit, but it does not appeal the ruling as to those claims.

acts of mail and wire fraud. Then, on summary judgment, the court held that P&G lacked standing to bring its § 43(a) claim based on Amway's alleged illegal pyramid scheme and that the fraud claim was time-barred. In September 1998, the Utah court granted defendants' joint motion for summary judgment and dismissed the § 43(a) claim, stating that "the misrepresentation at issue does not relate to a product within the meaning of the Lanham Act." Inexplicably, in the Utah court, P&G claimed only that Amway's actions constituted a violation of the Lanham Act's prohibition on the misrepresentation of goods or services, even though that act also provides a cause of action for misrepresentation of commercial activity.[8]

P&G did not argue that repetition of the Satanism rumor constituted misrepresentation of its commercial activities until its Fed.R.Civ.P. 60(b) motion for reconsideration of the Utah court's grant of summary judgment. The Utah court denied P&G's motion for reconsideration, finding no excuse for P&G's failure to raise the commercial activities claim earlier.

In March 1999, the Utah court granted summary judgment to defendants on the defamation *per se,* vicarious liability, and negligent supervision claims. A few days later, before the

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[8] Section 43(a) provides:

> Any person who, in or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person .... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. 15 U.S.C. § 1125(a)(1).

Texas case went to trial, the Utah court entered a final judgment dismissing all of P&G's claims.

After the final judgment from the Utah court, Amway moved for judgment as a matter of law ("j.m.l.") in the Texas case. The district court denied the motion because it was filed after the deadline for pre-trial motions. At the close of P&G's case, Amway again moved for j.m.l. The court granted the motion and dismissed the § 43(a) claim against Amway, Walker, and Haugen based on the *res judicata* effect of the Utah court's decision. The Texas court dismissed the § 43(a) claim for disparagement of commercial activities against the remaining defendants (and against Amway, Walker, and Haugen for purposes of vicarious liability), because it found that P&G had not presented sufficient evidence of "actual malice," which the court held to be a requirement of § 43(a) suits brought by "limited-purpose public figure" plaintiffs.[9] The court also dismissed the Texas Business and Commerce Code § 16.29 claim and all remaining claims.

After oral argument had been heard in this court, the Tenth Circuit reversed the Utah summary judgment. *P&G v. Haugen,* 222 F.3d 1262 (10th Cir.2000). The Tenth Circuit addressed P&G's misrepresentation of commercial activities claim, even though P&G had not timely raised it before the Utah district court. The Tenth Circuit explained its willingness by stating that where an issue is purely a matter of law, its resolution is certain, and public interest is implicated, it should be addressed on appeal. *Id.* at 1271. The Tenth Circuit concluded that the repetition of the Satanism rumor raised a claim under the "commercial activities" prong of the Lanham Act, and it

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[9] The court ruled that P&G was a "limited-purpose public figure" with regard to the Satanism rumor and that thus the First Amendment protection of the *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), "actual malice" test applied to shield erroneous but non-malicious speech regarding an issue of public concern--in this case, P&G's alleged links to Satanism.

therefore reversed and remanded as to the Lanham Act claim and reversed the dismissal of P&G's Utah state law tortious interference claim. *Id.* at 1280.

III.

The *res judicata* effect of the Utah judgment is a question of law that we review *de novo*. *United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir.1997). This question--to which both sides direct most of their briefs--has largely been answered for us by the Tenth Circuit.

There is no *res judicata* effect from the Utah case. The final judgment has been reversed and remanded, and therefore no judgment blocks the Texas case from proceeding. Of course, at the time the Texas court dismissed, there was a final judgment in Utah, so the Texas court did not err. Now that the final judgment has been reversed and remanded, however, *res judicata* no longer binds us.

Amway argues that *res judicata,* or, alternatively, issue preclusion, settles this case, despite the Utah remand. It contends that the Tenth Circuit's holding that it is not vicariously liable under Utah law for the acts of its distributors precludes liability under the Lanham Act in the Texas suit. This is a bold assertion, for the Tenth Circuit did not reach this conclusion, but, instead, "le[ft] it to the district court to consider whether P&G has met those elements of a § 43(a) Lanham Act claim not before us in this appeal." *Haugen,* 222 F.3d at 1276. Likewise declining to let a decision on state law vicarious liability determine the outcome of a Lanham Act claim, we conclude that neither *res judicata* nor collateral estoppel bars the Lanham Act claim and that the Texas case may proceed.[10]

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[10] Of course, the Texas district court retains its normal discretion in scheduling cases and granting stays pending other developments or the outcomes of similar trials. Should the court try this case to conclusion

(continued...)

IV.

P&G avers that the district court erred in ruling that P&G was required to prove "actual malice"[11] to prevail on its § 43(a) claim for disparagement of commercial activities. The actual-malice standard has developed in cases involving defamation of public figures. P&G argues that strict liability and not actual malice applies in a commercial speech[12] case under the Lanham Act.

Amway makes two arguments in response. First, acknowledging that the Lanham Act covers only commercial speech, Amway urges that the speech here is not commercial and that therefore a § 43(a) claim will not lie.[13] Second, and

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[10] (...continued)
before the Utah court does, however, then the tables will be turned, and it will be left to the Utah court and the Tenth Circuit to determine the *res judicata* effect on the Utah case of the Texas court's decision.

[11] "Actual malice" is a term of art meaning that the speaker knew the statement was false when spoken or in fact entertained serious doubt about its truth. *Peter Scalamandre & Sons, Inc. v. Kaufman,* 113 F.3d 556, 560 (5th Cir.1997). Actual malice must be proven by clear and convincing evidence. *Id.*

[12] The First Amendment affords less protection to commercial speech and none to *false* commercial speech. *Va. State Bd. of Pharmacy. v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). No party questions that the speech linking P&G to Satanism is false.

[13] In *Seven-Up Co. v. Coca-Cola Co.,* 86 F.3d 1379, 1383 n. 6 (5th Cir.1996), we held that the Lanham Act extends only to false or misleading speech that is encompassed within the Supreme Court's commercial speech doctrine: The "commercial" requirement was inserted to ensure that § 43(a) does not infringe on free speech protected by the First Amendment. See 135 Cong. Rec. H1216-17 (daily ed. Apr. 13, 1989) (statement of Rep. Kastenmeier) ("[T]he proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material.... The section is narrowly drafted to encompass only clearly false and misleading (continued...)

alternatively, Amway argues that even if the speech is commercial, the actual-malice standard should apply, because the Satanism rumor is an issue of public concern, and P&G is a "limited-purpose public figure" with respect to the rumor.

Thus, to determine what P&G is required to prove to prevail on its § 43(a) claim that Amway misrepresented its associations and commercial activities, we first must determine whether the spreading of the false Satanism rumor is "commercial" speech. If we decide it is, we must decide whether the fact that the false speech was made about a "limited-purpose public figure" on an issue of public concern brings the actual-malice standard into play. This effectively would trump the traditional view that there is no First Amendment protection for false commercial speech. We review these questions of law *de novo. United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir.1997).

A.

We begin by examining what is meant by, and what protections extend to, "commercial speech." First, we consider whether the commercial speech line of cases, which mainly deals with government regulation of speech, should apply in this case of a private action for false speech.[14] Second, we examine the historical development of the commercial speech exception to the full protections granted by the First Amendment. In making this examination, we pay particular attention to the characteristics that the Supreme Court has said make certain speech "commercial" and therefore worthy of less

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[13] (...continued)
commercial speech."); 134 Cong. Rec. 31,851 (Oct. 19, 1988) (statement of Rep. Kastenmeier) (commenting that the reach of § 43(a) "specifically extends only to false and misleading speech that is encompassed within the 'commercial speech' doctrine developed by the United States Supreme Court"). *See generally Gordon & Breach Science Publishers S.A., STBS v. American Institute of Physics,* 859 F.Supp. 1521, 1533-34 (1994) (discussing the legislative history of the Lanham Act).

[14] This is a question of first impression in this circuit.

protection. Third, we take the facts of the case *sub judice* and apply the test set out in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), for determining whether a specific instance of speech is commercial. Our application of the *Bolger* test is what ultimately determines whether the speech is commercial.

1.

P&G relies heavily on *U.S. Healthcare, Inc. v. Blue Cross,* 898 F.2d 914 (3d Cir.1990), to argue that the commercial speech line of cases developed in the context of government regulation also should apply here in the context of a private suit for false speech. In *U.S. Healthcare,* the two parties had waged an advertising battle contrasting the benefits of HMO health insurance plans with "traditional" and preferred provider organization ("PPO") plans. When U.S. Healthcare sued under the Lanham Act, Blue Cross argued that the commercial speech doctrine was inapplicable because the Supreme Court "views damage claims [brought by private citizens] and government restrictions of speech as requiring distinctly different analysis for First Amendment purposes." *Id.* at 927.

As we do now, the court treated the issue as one of first impression. It began by noting that under the First Amendment, the correctness of ideas is judged not by courts, but in the marketplace of ideas.[15] With regard to commercial

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[15] The Third Circuit said:

> Most speech is protected by the First Amendment. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (there are "few classes of 'unprotected' speech"). "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* [*v. Robert Welch, Inc.*], 418 U.S. [323,] 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 [(1974)] (footnote omitted), *quoted in Jenkins v. KYW,* 829 F.2d 403, 408 (3d Cir.1987).

(continued...)

speech, however, the court "believe[d] the subordinate valuation of commercial speech is not confined to the government regulation line of cases [,]" but instead should extend to defamation and Lanham Act cases as well. *Id.* at 932. The court noted that the Supreme Court

> on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others.... In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, [436 U.S.] at 456, 98 S.Ct. 1912; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

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[15] (...continued)

Even false statements of fact are insulated from liability in some situations. [*Philadelphia Newspapers, Inc. v.*] *Hepps*, 475 U.S. [767,] 778, 106 S.Ct. 1558, 89 L.Ed.2d 783 [(1986)]; *Gertz*, 418 U.S. at 340-41, 94 S.Ct. 2997. As Judge Learned Hand put it, the First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943), *aff'd*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945)).

U.S. Healthcare, 898 F.2d at 928.

U.S. Healthcare, 898 F.2d at 932 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 n. 5, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)) (some ellipses and brackets added). Based on this language, the *U.S. Healthcare* court concluded that the lesser protection commercial speech receives from direct government regulation also must apply to private actions for defamation and the like.

We agree. If commercial speech receives less protection from government regulation, then it also should receive less protection from private suits, which are not much more likely than are government regulation to infringe on those values the First Amendment seeks to protect. Furthermore, private suits can be a form of government regulation.

2.

Having determined that the commercial speech line of cases should apply here, we examine it and the characteristics of commercial speech it reveals. We also review the instant facts to determine whether they meet the characteristics that the Supreme Court has said define commercial speech.

Commercial speech has been defined, at its core, as speech that merely proposes a commercial transaction. *Va. State Bd.*, 425 U.S. at 762, 96 S.Ct. 1817. Because such speech traditionally has been thought less valuable than political speech, which is at the core of the First Amendment, commercial speech is not accorded the full protections given to political speech, speech on matters of public concern, and speech regarding public figures.[16] In fact, for a time it was

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[16] In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n. 6, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Court explained why commercial speech may be more heavily regulated:

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the

(continued...)

thought that commercial speech might not be worthy of any First Amendment protection.[17]

In *Virginia State Board,* the Court finally decided that commercial speech should receive some protection, holding that a state may not prohibit pharmacists from truthfully advertising the prices at which they sell drugs. The Court suggested, however, that instead of the strict scrutiny with which courts review most restrictions on speech, a lower standard of scrutiny is appropriate for commercial speech. The Court noted that false or misleading commercial speech should receive no protection,[18] because commercial speech merely gives information to consumers about a producer's goods, and any false information either has no value or is harmful.

The Court since has held that speech is commercial when it is an "expression related solely to the economic interests of the speaker and its audience." *Central Hudson,* 447 U.S. at 561, 100 S.Ct. 2343 (citing *Va. State Bd.,* 425 U.S. at 762, 96 S.Ct. 1817 (other citations omitted)). Additionally, in defining something as commercial speech, the Court says we are to rely on "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally

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[16] (...continued)
accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.

[17] *See Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); *Breard v. Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Murdock v. Pennsylvania,* 319 U.S. 105, 111, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Jamison v. Texas,* 318 U.S. 413, 417, 63 S.Ct. 669, 87 L.Ed. 869 (1943).

[18] *Va. State Bd.,* 425 U.S. at 771-72 n. 24, 96 S.Ct. 1817 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it....").

subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 455-56, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

Further, although Amway argues that the Satanism rumor is a matter of public concern, which should make the speech noncommercial, the Court "ha[s] made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger,* 463 U.S. at 68, 103 S.Ct. 2875 (quoting *Central Hudson,* 447 U.S. at 563, n. 5, 100 S.Ct. 2343). Thus, in *Bolger* the Court held that informational pamphlets mailed by a condom manufacturer directly to the public constituted commercial speech, even though the pamphlets spoke about matters of public concern.[19]

A recent examination of Supreme Court precedent explaining why commercial speech receives less protection was made in *U.S. Healthcare,* in which the court identified four characteristics of commercial speech that have been set out by the Supreme Court over the years. First, commercial speech makes a qualitatively different contribution to the exposition of

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[19] Youngs Drug Products Company sent out two informational pamphlets. The first was called "Condoms and Human Sexuality," which specifically referred to the advantages of a certain brand of condoms. The second informational pamphlet was called "Plain Talk about Venereal Disease." It discussed venereal disease and condoms without ever referencing any specific condoms. The only reference to Youngs Drug's products was at the bottom of the last page, where Youngs Drug identified itself as the manufacturer of the Trojan-brand condoms. The Court noted that Youngs Drug described itself as "the leader in the manufacture and sale of contraceptives." The Court opined that simply because "a product is referred to generically does not, however, remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names." *Bolger,* 463 U.S. at 67 n. 13, 103 S.Ct. 2875. Even though the Court concluded that the speech in *Bolger* was commercial, it nevertheless held that the federal statute was an unconstitutional restriction on the distribution of truthful information. *Id.* at 74, 103 S.Ct. 2875.

ideas.[20] Second, commercial speech is more durable than other speech because the speaker has an economic motivation and is less likely to be chilled in its speech.[21] Third, "commercial speakers have extensive knowledge of both their market and their own products. Consequently, they are uniquely situated to evaluate the truthfulness of their speech."[22] Fourth, "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech."[23]

If we examine the facts of this case in light of these four characteristics, we see that the speech at issue here has some but not all of the characteristics typically found in commercial speech. The first characteristic--that commercial speech makes a qualitatively different contribution to the exposition of ideas--does not shed much light on whether the speech in this case is commercial.

It might be that spreading the Satanism rumor does not contribute to the exposition of ideas. Despite the falsity of the rumor, however, it touched on the type of issues that are at the

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[20] *U.S. Healthcare*, 898 F.2d at 933-34 (citing *Central Hudson*, 447 U.S. at 561, 100 S.Ct. 2343 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience")).

[21] *Id.* at 934 (quoting *Va. State Bd.*, 425 U.S. at 772 n. 24, 96 S.Ct. 1817 (explaining that this quality "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.")); *see also Dun & Bradstreet*, 472 U.S. at 759 n. 5, 762 & n. 8, 105 S.Ct. 2939 (discussing durability "to show how many of the same concerns that argue in favor of reduced constitutional protection" in commercial speech actions also apply to defamation actions concerning private speech).

[22] *Id.* (citing *Central Hudson*, 447 U.S. at 564 n. 6, 100 S.Ct. 2343; *Bates v. State Bar*, 433 U.S. 350, 381, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Va. State Bd.*, 425 U.S. at 772 n. 24, 96 S.Ct. 1817; *Dun & Bradstreet*, 472 U.S. at 758 n. 5, 762 & n. 8, 105 S.Ct. 2939).

[23] *Id.* (quoting *Ohralik*, 436 U.S. at 456, 98 S.Ct. 1912).

heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society. Further, it is uncertain whether the speech was related solely to the economic interests of the speaker or whether, instead, Haugen and other distributors were sincerely, albeit mistakenly, discussing the rumor.

The second characteristic--that the speaker's economic motivation makes the speech more durable--favors classifying Amway's speech as commercial. If the Satanism rumor were true, it is doubtful that the requirement to verify it before repeating it would stop distributors from spreading the rumor about one of their competitors. We have some reservation about stating this too strongly, however, for we can imagine cases in which employees of one company might legitimately but mistakenly repeat and discuss news about the political, religious, or other beliefs of employees of a competitor. It would violate First Amendment principles to quell all speech on these issues among members of a competing company until the news was fully and exhaustively verified.[24]

The third characteristic--that competitors have extensive knowledge of their market and products--applies imperfectly to these facts. Amway has extensive knowledge of its market and products and is in a good position to know the acts of its competitors. In this case, however, the rumor discusses P&G's use of its profits and its charitable giving--topics about which Amway is likely to know less because they do not relate directly to P&G's products or sales methods. Nevertheless, if Haugen had checked with Amway, he could have verified that

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[24] A current example may help illustrate this point. It was recently reported that some movie studios have conducted advertising campaigns and focus groups on children under the age of seventeen to make some of their R-rated movies more attractive to them. Discussion of this issue may be of true concern to members of competing movie studios. Holding the accuracy of such discussion to a strict-liability standard likely would violate First Amendment values.

the rumor was false, because Amway had been aware of its falsity since the 1980's.

The fourth characteristic--a parity of constitutional protection for commercial speech would invite dilution of the First Amendment--is, as the Third Circuit noted, an extrinsic reason that cannot be applied to the facts of any one case. We accordingly do not discuss it.

In *U.S. Healthcare,* 898 F.2d at 935, the court determined that the speech had all the characteristics of commercial speech. The court concluded that

> [b]ecause the thrust of all of the advertisements is to convince the consuming public to bring its business to one of these health care giants rather than the other, there is no doubt that the advertisements were motivated by economic self interest.... [W]e believe it would have to be a cold day before these corporations would be chilled from speaking about the comparative merits of their products.

Id. The court added that

> these are advertisements for products and services in markets in which U.S. Healthcare and Blue Cross/Blue Shield deal--and, presumably, know more about than anyone else. The facts upon which the advertisements are based-- comparative price, procedures, and services offered--are readily objectifiable. These advertisements were precisely calculated, developed over time and published only when the corporate speakers were ready. Consequently, the advertisements were unusually verifiable.

Id.

Unlike the situation in *U.S. Healthcare,* the testimony here is that at least some of the speech at issue was made impulsively, without time to verify the facts. The *U.S. Healthcare* court stated that "[i]t is important to note that we do

not have a situation in which a corporation addresses an issue of public concern involving a competitor, but does so with speech that is neither commercial nor chill resistant." *Id.* In the instant case, the primary question is whether Amway's distributors addressed an issue of public concern involving a competitor with speech that was neither commercial nor chill-resistant.

Our analysis of the general characteristics of commercial speech and the reasons behind its less protected status demonstrates that the speech here does not sort cleanly into either category: commercial or noncommercial. Although Supreme Court precedent and the Third Circuit's thoughtful analysis of what is commercial speech are helpful, we still are left with a difficult issue.

3.

We now apply the test the Court has set out to determine whether a specific instance of speech is commercial. In *Bolger,* the Court recognized three factors that help determine whether speech is commercial: (i) whether the communication is an advertisement, (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech. If all three factors are present, there is "strong support" for the conclusion that the speech is commercial. *Bolger,* 463 U.S. at 67, 103 S.Ct. 2875.

Here we consider the *Bolger* factors in reverse order[25] and conclude that the third--the motivation of the speaker--is

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[25] The *Bolger* test easily disposes of any question as to whether the fliers that were printed by Amway distributors and given to customers or potential customers were commercial speech--they plainly were. These fliers, associating P&G with Satanism and suggesting Amway products as alternatives to P&G products, (i) were advertisements--i.e., they proposed a commercial transaction, (ii) they referred to specific products, and (iii) the distributors plainly had an economic motive in distributing them.

determinative. This factor has not yet been decided by the trier of fact, so we remand for that to be done.

The second factor is easily satisfied--the message did refer to specific products of P&G's. The first factor--whether the speech is an advertisement-- seems to collapse into the third factor in this case. Certainly the repetition of the rumor via AmVox was not an advertisement in the classic sense, but whether it could be considered as a negative advertisement against P&G seems to depend on the determination of the third factor--whether the speaker had an economic motivation for the speech. If Haugen or others who repeated this rumor did have economic motivations, then the message resembles an advertisement seeking to encourage downline distributors to eschew P&G and buy Amway. If the motivation was not economic, then this looks more like a case of individuals' repeating false speech on a matter of public concern.

This question of the speaker's motivation will also help to clear up the difficulty in determining whether the characteristics of commercial speech summarized in *U.S. Healthcare* were present here. If the speakers were economically motivated, then issues of the quality of the speech, its durability, and the knowledge the speakers had of the relevant market and products become both more relevant and easier to determine.

Thus, on remand, if the trier of fact finds that the motivation behind the Amway distributors' repetition of the rumor to other distributors was not economic, the speech is not commercial, and there can be no Lanham Act claim. On the other hand, if an economic motivation is found, the speech is commercial, and a violation of the Lanham Act may be found.[26]

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[26] We are not simply repackaging the "actual malice" requirement as a requirement of economic motivation. A finding of actual malice turns on the finding of false speech knowingly made, or of false speech made with a reckless disregard for the truth. The requirement of finding an economic motivation to label something commercial speech does not require a finding

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The question whether an economic motive existed is more than a question whether there was an economic incentive for the speaker to make the speech;[27] the *Bolger* test also requires that the speaker acted *substantially* out of economic motivation. Thus, for example, speech that is principally based on religious or political convictions, but which may also benefit the speaker economically, would fall short of the requirement that the speech was economically motivated.[28] We stress that we are

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[26] (...continued)
that the speech was false or that the speaker knew the speech was false before making it, but only a motive to profit by the speech. Once that motive is found, and if the other *Bolger* elements are present to provide strong support that the speech is commercial, the speech is dropped to the less-protected status of commercial speech, and a suit may be successful against the speaker regardless of his knowledge of falsity.

[27] Professor Farber has pointed out that the mere existence of some economic motivation cannot be enough to drop speech to the lower protected status of commercial speech: "Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors." Farber, *Commercial Speech and First Amendment Theory,* 74 NW. U.L. REV. 372, 382-383 (1979) (footnotes omitted).

[28] We offer a specific example: A woman who owns a small religious book and music store tells customers that most rock and roll music is influenced by the devil and that the only kind of rock music they should buy is "Christian rock," which is, of course, the only kind she sells. The determination of whether a Lanham Act suit could be brought will turn on her motivation.

Evidence that she started the bookstore because of strongly-held religious beliefs that Christian books and music need to be made available to combat the evils of rock and roll and pulp fiction would be compelling evidence of a primarily religious, rather than economic, motivation for her speech. On the other hand, evidence showing that she is agnostic and opened the bookstore only after a case study in her MBA program showed that Christian bookstores can be extremely profitable when set up in the right locations would be strong evidence that her speech was economically motivated and

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not shortening the *Bolger* test to a single factor--whether the speaker's motive was economic--but rather, we conclude that the other two *Bolger* factors are not conclusive, and therefore the motive factor is determinative.

This does not mean that whenever the primary motivation for speech is economic, the speech is commercial.[29] As the Court said in *Bolger*, finding all three factors merely provides "strong support" for the proposition that the speech is commercial. The difference between commercial speech and noncommercial speech is, after all, "a matter of degree." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). We can well imagine cases in which a speaker's primary motivation is economic, but the speech nonetheless is protected.[30]

Also, in determining whether there was an economic motivation to the repetition of the rumor, the finder of fact is free to take into account, among other things, Amway's unique structure. Pertinent is the fact that Amway distributors make money not simply by selling Amway products to the public, but also by recruiting other distributors into the organization, who become "downline" distributors, and upon whose sales the "upline" distributors then get commissions.

This system gives the distributors a motivation not just to sell Amway products, but also to recruit distributors and to encourage their sales. Thus, when Haugen and other Amway distributors spread the Satanism rumor via AmVox to their downline distributors, they were not simply repeating a rumor

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[28] (...continued)
thus commercial.

[29] As the Court said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), "it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority."

[30] Labor cases come to mind as an example.

to co- workers or fellow independent distributors; they were repeating a rumor to persons analogous to employees,[31] in whose motivation and sales they have a direct interest. These facts, and all other relevant evidence, of course, may be used by the finder of fact in determining whether, as a matter of fact, those who circulated the Satanism rumor via AmVox acted out of economic motivation.

B.

Notwithstanding Supreme Court precedent holding that false commercial speech receives no First Amendment protection, Amway argues that we should require a finding of actual malice whenever speech is made about a public figure on an issue of public concern. In making this argument, Amway looks to the line of defamation cases setting out and developing the actual-malice standard.

That standard was developed in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). There, a group of black clergymen ran an advertisement in the *Times* in the form of an editorial; they spoke of the civil rights demonstrations by black students then occurring in the South and of the intimidation and violence practiced against the protestors and against Dr. Martin Luther King, Jr. The advertisement complained of the police responses to the demonstrators and asked for financial donations in support of the student movement, the struggle for the right to vote, and the legal defense of Dr. King. L.B. Sullivan, the Montgomery commissioner in charge of police, sued the clergymen and the *Times* for civil libel, arguing that the actions ascribed to the "police" were necessarily imputed to his leadership and that

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[31] We use the phrase "analogous to employees" purposely. We are merely making an analogy and are not ruling on whether Amway distributors are employees or independent contractors. We have not been asked to decide this question, nor do we have sufficient evidence to do so.

some of the accusations were false. Sullivan further argued that the Times could have discovered that the allegations were false by checking its files of previously published articles.

The Court agreed that references to the police could be imputed to Sullivan and that some of them were false. Nevertheless, the Court held that proof of more than factual inaccuracies was required to prevent speech protected by the First Amendment from being "chilled." The Court held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80, 84 S.Ct. 710.[32]

Three years later, the Court extended the protection of the actual malice standard from public officials to public figures in the companion cases of *Curtis Publishing Co. v. Butts* and

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[32] *See also New York Times*, 376 U.S. at 271-72, 84 S.Ct. 710 (stating that "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive' ") (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). The inevitability of erroneous statements being made in free debate is not a new concept:

> [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion ... all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.

J. Mill, ON LIBERTY, 47 (Oxford: Blackwell 1947).

Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In *Gertz v. Welch,* 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court explained why the actual-malice standard is appropriate in defamation cases involving public officials or public figures as plaintiffs. The Court gave the reasons for the lower level of protection for these plaintiffs:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Id. at 344, 94 S.Ct. 2997 (footnote omitted).

A plaintiff becomes a general purpose public figure by attaining pervasive power and influence in society. *Id.* at 345, 94 S.Ct. 2997. Alternatively, he may become a limited-purpose public figure with regard to that controversy by thrusting himself into a particular public controversy "to influence the resolution of the issues involved." *Id.* "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.*

We are powerless to decide whether this is one of those "exceedingly rare" cases in which plaintiff P&G involuntarily has become a public figure, because that issue has not been properly raised on appeal. In its opening brief, P&G noted that the district court found it to be a "limited-purpose public figure" for the purpose of analyzing whether it must prove actual malice in its § 43(a) claim; that court decided that the rumor is an issue of public concern and has been associated with P&G long enough to render P&G a limited-purpose public figure for purposes of discussion of the rumor. P&G did not assign error to this ruling in its initial brief but, instead, asserted that the

repetition of the Satanism rumor constituted commercial speech to which the *New York Times* actual malice standard does not apply.

Amway correctly notes that because P&G did not dispute this ruling, it is now bound thereby for purposes of this appeal. Although in its reply brief, P&G states that it "does not concede that it is a 'public figure' for purposes of defendants' misrepresentations," an "appellant abandons all issues not raised and argued in its initial brief on appeal." *Cinel v. Connick,* 15 F.3d 1338, 1345 (5th Cir.1994) (declining to address argument discussed only in appellant's reply brief). Thus, we assume for purposes of this appeal, without deciding the issue as a matter of law, that P&G is a limited-purpose public figure with regard to the Satanism rumor.

Amway makes two arguments in support of its theory that P&G must prove actual malice. First, Amway turns to the well-reasoned opinion in *National Life Insurance Co. v. Phillips Publishing, Inc.,* 793 F.Supp. 627, 647 (D.Md.1992), in which the court noted that there is a tension in the law regarding the treatment of false speech: "While defamation tolerates some false statements, in order to give the First Amendment the 'breathing space' it requires; commercial speech does not forgive false speech so easily." *Id.* The court opined that this tension should be considered rather than ignored when dealing with cases of false commercial speech about public figures.[33]

The *National Life* court reasoned that denying constitutional protection to all false commercial speech ignores the rationale

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[33] The court cites two examples of the tension in Supreme Court caselaw. It compares *Gertz,* 418 U.S. at 340, 94 S.Ct. 2997 (holding that application of the malice standard to public figure plaintiffs is predicated on the recognition that error is "inevitable in free debate"), with *Central Hudson,* 447 U.S. at 564, 100 S.Ct. 2343 (stating that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform....").

of *Gertz:* that the need to protect one from false or misleading speech varies, depending on whether he is a private or public figure. The court pointed out that "[e]ven *U.S. Healthcare* recognized that a state has only a 'limited' interest in compensating public persons for injury to reputation by defamatory statements, but has a 'strong and legitimate interest' in compensating private persons for the same injury." *National Life,* 793 F.Supp. at 648 (quoting *U.S. Healthcare,* 898 F.2d at 930).[34] Thus, the court concluded that a state's interests in regulating false commercial speech and in providing some protection to public figures' reputations must be balanced against the free speech interest individuals have in being able to comment freely on public issues and public figures. The court held that the way to achieve this balance, in cases of commercial speech about a public figure, is to require that the plaintiff prove actual malice.

Amway's second argument is that the use of the actual-malice standard in commercial speech cases involving public figures avoids unrealistically treating commercial and noncommercial speech as though they do not overlap. Amway contends that such treatment ignores that political speech can

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[34] In *U.S. Healthcare,* the court addressed the same argument that Amway makes here--that the actual malice standard should apply to protect even false commercial speech if it is made about a limited-purpose public figure. The court did not consider the argument directly, because it concluded that the corporations that were the parties in that case were not public figures. Nevertheless, it stated that "the [commercial] speech at issue does not receive heightened protection under the First Amendment. Because this speech is chill-resistant, the *New York Times* standard is not ... 'necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.'" *U.S. Healthcare,* 898 F.2d at 939 (quoting *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)).

arise from commercial motives or may address areas of great public concern.[35]

Although Amway raises legitimate points about the overlap between commercial and noncommercial speech, between economic and non-economic motivation for speech, and about the variable interest a state has in protecting a plaintiff's reputation depending on the plaintiff's status as a public or private figure, Supreme Court precedent prevents us from importing the actual-malice standard into cases involving false commercial speech.

To begin with, the Court has rejected attempts to blur the line between commercial speech and other types of expression. In *Central Hudson,* the majority rejected the rationale set forth in a concurrence that "[a]pparently ... would accord full First Amendment protection to all promotional advertising that includes claims 'relating to ... questions frequently discussed and debated by our political leaders.'" *Id.* at 563 n. 5, 100 S.Ct. 2343 (quoting *id.* at 581, 100 S.Ct. 2343) (Stevens, J., concurring). In rejecting this approach, the majority reasoned that "we think it would blur further the line the Court has sought to draw in commercial speech cases." *Id.*[36]

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[35] *Cf. Bolger* (holding that First Amendment protects contraceptive manufacturer's unsolicited mailing of informational and advertising pamphlets to households, because contraception information-- even if distributed for commercial purpose--is a matter of public concern).

[36] The Court noted that corporations enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions. In that context, for example, the State retains the power to "insur[e] that the stream of commercial information flow[s] cleanly as well as freely." ... As we stated in *Ohralik,* the failure to distinguish between commercial and noncommercial speech "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Id.* (quoting *Va. State Bd.,* 425 U.S. at 772, 96 S.Ct. 1817,

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Further, the Court has consistently said that speech protected in one context is not protected when the purpose of the speech is commercial. In *Bolger*, the Court held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." 463 U.S. at 68, 103 S.Ct. 2875 (quoting *Central Hudson*, 447 U.S. at 563 n. 5, 100 S.Ct. 2343). "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.*

Somewhat more recently, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), the Court affirmed its *Central Hudson* and *Bolger* holdings. Zauderer was a lawyer who had been sanctioned by the disciplinary committee of his state supreme court for using deceptive newspaper advertisements. He claimed that his speech was protected because some of the advertisements contained statements regarding the legal rights of persons injured by a contraceptive device. The Court held that these statements "in another context, would be fully protected speech," but "[t]hat this is so does not alter the status of the advertisements as commercial speech." *Id.* at 637 n. 7, 105 S.Ct. 2265.

Central Hudson, *Bolger*, and *Zauderer*, combined with the Court's plain statements that false commercial speech receives no protection,[37] foreclose us from importing the actual-malice standard from defamation into the law of false commercial

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[36] (...continued)
and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)).

[37] *E.g.*, *Ibanez v. Florida Dep't of Business & Professional Regulation*, 512 U.S. 136, 142, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Friedman v. Rogers*, 440 U.S. 1, 14-15, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); *Va. State Bd.*, 425 U.S. at 771-72 & n. 24, 96 S.Ct. 1817.

speech. Thus, if the trier of fact determines that the Amway distributors' motives in spreading the Satanism rumor were economic and that the speech therefore was commercial, this false commercial speech cannot qualify for the heightened protection of the First Amendment, so P&G is not required to show actual malice in proving its Lanham Act claim.

The Tenth Circuit concluded similarly in this case, holding that the AmVox message was economically motivated and rejecting Amway's argument that such commercial speech should receive higher protection because it regarded a matter of public concern. *P&G v. Haugen*, 222 F.3d at 1275.

> In the present case, we are likewise dealing with a message containing both a noncommercial, "theological" component and a commercial component. As *Bolger* and *Fox* indicate, however, the bare fact that the subject message contains a "theological" component is insufficient to transform it into noncommercial speech. If appellees had argued that a significant theological, political, or other noncommercial purpose underlay the subject message, the message might be accorded the substantially greater First Amendment protections enjoyed by "core" religious speech and the other varieties of noncommercial First Amendment speech such as political speech. *See, e.g., Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir.1989) (holding "that the presence of some commercial activity does not change the standard of first amendment review" where the organization engaged in such activity had a clear political purpose (citing *In re Grand Jury Proceeding*, 842 F.2d 1229, 1235 (11th Cir.1988))). Significantly, appellees in the instant case have made no such claim. At no time have they argued there is any theological purpose underlying the subject message or its dissemination via their AmVox system.

Id.

Amway has argued here, as it apparently did not in the Tenth Circuit, that there was a theological concern underlying the speech. We thus are foreclosed from merely calling the speech commercial. Regardless, both the Tenth Circuit and this court are using the same test to determine commercial speech, and both reject Amway's argument that the actual-malice standard should apply.

We recognize that alternative methods of reconciling the law of commercial speech with that of defamation have been suggested. Professor Langvardt has suggested one tempting alternative. He posits that courts should adopt a negligence standard for private actions for false commercial speech.[38] After thoughtfully considering this solution, we feel compelled to reject it. While Professor Langvardt's proposal is compelling in a number of respects, our approach more closely adheres to the caselaw and principles set out by the Supreme Court in the areas of commercial speech and First Amendment law.

Langvardt agrees with our analysis that the full protection from chill that the actual malice standard gives to core First Amendment speech is inappropriate in the context of less-protected commercial speech. He argues that, instead, a standard should be used that gives commercial speech an intermediate level of protection from chill. In his view, "negligence effectively provides an intermediate standard that falls between the polar extremes of actual malice and strict liability." Langvardt, 78 MINN. L. REV. at 393. Under such a regime, plaintiffs would be required to prove "that the defendant failed to use the degree of care a reasonable person would have exercised, under the circumstances, to ascertain the truth or falsity of the statement before making it." *Id.* at 393. To Langvardt, the use of a negligence standard recognizes that commercial speech is more durable than noncommercial

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[38] Arlen W. Langvardt, *Commercial Falsehood and the First Amendment: A Proposed Framework*, 78 MINN. L. REV. 309 (1993).

speech, but it still prevents the former from being overly chilled by the possibility of private suits for strict liability under the Lanham Act.[39]

Langvardt would avoid Supreme Court precedent stating that false commercial speech receives no protection under the First Amendment by restricting this holding to the direct-government-regulation line of cases from which it sprang. He points out that the Court has not held--and he believes would not hold--that false commercial speech receives no First Amendment protection from private suits.[40] According to Langvardt, the reason the Court would not do so is that private suits have a greater potential to chill commercial speech than do direct government regulations. He claims that private suits are not as narrowly tailored and allow large damage awards, both of which create greater potential for chill.

Although support for this theory may be found in *New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710, in which the Court said that "[t]he fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute," the Court has never limited its holding that false commercial speech receives no First Amendment protection. It is doubtful that the prospect of a private action is a significantly greater deterrent to a commercial speaker than is the prospect of the

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[39] Langvardt's theory also would vary the standard by which a party must prove negligence, based on whether the speech is a matter of public or private concern. Allegations regarding the former should be proven by clear and convincing evidence, and the latter should be proven by a mere preponderance of the evidence. *Id.* at 393-95.

[40] Langvardt points out that before its 1989 revision, no suit could be brought under the Lanham Act for false advertising about a competitor. The Act was amended effective November 16, 1989, by the Trademark Law Revision Act of 1988, 15 U.S.C. §§ 1051-1128 (1988). The pre-1989 Act allowed only suits against companies for a company's false advertising about its own products. The post-1989 Lanham Act--with its strict liability standard for false commercial speech--thus has a substantially greater potential to chill truthful commercial speech, according to Langvardt.

civil and criminal penalties available to government regulators. Further, a commercial speaker may be chilled in his speech by the prospect of having to pay the costs of a suit to have an overly broad regulation narrowed by a court.

Additionally, Langvardt's proposal, if adopted, would result in differing amounts of protection for false commercial speech depending on whether the speaker discusses his own goods or those of another. Langvardt acknowledges that false advertising claims by a defendant about its own products traditionally have been subjected to strict liability under § 43(a), and he does not argue that this excessively chills commercial speech. He maintains that strict liability should continue to apply to a defendant's claims about its own products but that a negligence standard should be applied to false statements about a competitor's products.

It seems, however, that this double standard would further confuse commercial speech law. The argument is not strong enough to justify differing standards of liability,[41] especially in light of the admonition that we not "blur further the line the Court has sought to draw in commercial speech cases." *Central Hudson*, 447 U.S. at 563 n. 5, 100 S.Ct. 2343.

V.

The district court was correct in dismissing P&G's alter ego, single business enterprise, and vicarious liability arguments against Ja-Ri and ADAC, because P&G provided neither sufficient evidence nor sufficient argument to support its position. P&G assigns error to these dismissals based on three grounds. First, it argues that it was unfairly surprised when the court applied Michigan rather than Texas law to these claims. Second, it contends that the court overlooked sufficient

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[41] Moreover, such a double standard could be subverted. Instead of saying that its product is the best, a company could state that all other products are inferior and by doing so move from a strict liability regime to one of negligence.

evidence to hold Ja-Ri and ADAC liable under the single-business-enterprise theory and vicariously liable for Lanham Act violations of downline distributors. Third, it avers that the court erred in *sua sponte* entering j.m.l. in favor of Ja-Ri, which P&G claims is a reversible violation of Fed.R.Civ.P. 50(a)(2). We review a j.m.l. *de novo. King v. Ames,* 179 F.3d 370, 373 (5th Cir.1999).[42]

None of P&G's arguments is adequately supported in its brief. First, P&G could not have been unfairly surprised that Michigan law might be applied to ADAC's motion for j.m.l. ADAC moved for j.m.l. based on Michigan law on May 7, 1999--six days before P&G rested its case--and, on May 10, P&G filed a memorandum in opposition to ADAC's memorandum on choice of law.

Second, P&G does not describe how it was prejudiced by the application of Michigan law. It does not provide examples of how the elements of Michigan and Texas law differ. Both Texas and Michigan law require that to prevail on an alter ego theory or otherwise to pierce the corporate veil, one must prove that failing to do so would promote injustice. *See Mancorp, Inc. v. Culpepper,* 836 S.W.2d 844, 846 (Tex.App.--Houston [1st Dist.] 1992, no writ); *Wells v. Firestone,* 421 Mich. 641, 364 N.W.2d 670 (1984); *Foodland Distributors v. Al-Naimi,* 220 Mich.App. 453, 559 N.W.2d 379 (1996). P&G does not even claim to have offered such proof. Thus, its argument that the court overlooked evidence sufficient to find against Ja-Ri and ADAC fails.

Third, rule 50 neither prohibits a court from suggesting that a party move for j.m.l. nor forbids a court from granting j.m.l. *sua sponte.* The rule merely states that if there is no sufficient evidentiary basis for the issue to go to the jury, "the court *may*

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[42] *See Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir.1969) (en banc), *overruled on other grounds, Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir.1997) (en banc).

determine the issue against that party and *may* grant a motion for [j.m.l.] against that party ..." (emphasis added).

Finally, P&G advances not a single theory as to why Ja-Ri and ADAC should be held liable under alter ego, single business enterprise, or vicarious liability law. Instead, P&G merely asserts that they should be. "A party who inadequately briefs an issue is considered to have abandoned the claim." *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.1994) (citation omitted).

VI.

A.

The district court is correct that P&G does not have standing to bring a § 43(a) claim based on Amway's alleged misrepresentations to its distributors about its allegedly illegal pyramid scheme. P&G asserted its claim based on Amway's alleged misrepresentations to its distributors of the financial rewards of being an Amway distributor. The court granted summary judgment based on its conclusion that P&G lacks prudential standing to bring this claim.

We review summary judgment rulings *de novo*. *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169, 173 (5th Cir.1999). Summary judgment is proper when, taking the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to ajudgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Standing has constitutional and prudential components. *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). To meet the constitutional standing requirement, a plaintiff must show (1) an injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision. *Bennett*, 520 U.S. at 162,

117 S.Ct. 1154; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Prudential standing requirements exist in addition to "the immutable requirements of Article III," *ACORN v. Fowler,* 178 F.3d 350, 362 (5th Cir.1999), as an integral part of "judicial self-government," *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. The goal of this self-governance is to determine whether the plaintiff "is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 546 n. 8, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).[43]

> These judicially created limits concern whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.

ACORN, 178 F.3d at 363.

Although Congress cannot change constitutional standing requirements, it "can modify or even abrogate prudential standing requirements, thus extending standing to the full extent permitted by Article III." *Id.* (citing *Bennett,* 520 U.S. at 162, 117 S.Ct. 1154) (other citation omitted). We therefore look to the statute in question to determine whether Congress expressed

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[43] *See also Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (opining that federal courts adopt prudential limits on standing "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim") (quoting *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99-100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)).

an intent to negate the background of prudential standing doctrine.[44]

B.

The question whether, in § 43, Congress intended to abrogate the background of prudential standing doctrine is one of first impression in this circuit. Congress did not expressly negate the background of prudential standing in § 43(a), which states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
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> (A) is likely to cause confusion, or to cause mistake or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by *any person* who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (1994) (emphasis added). The words "any person" might lead one to conclude that Congress intended to abrogate the background of prudential standing for purposes of the Lanham Act and allow anyone to sue who could achieve Article III standing. Section 45, however, states in pertinent part:

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[44] *See Bennett,* 520 U.S. at 163, 117 S.Ct. 1154 ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated.").

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks, and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

15 U.S.C. § 1127 (1994).[45] We agree with *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 229 (3d Cir.1998):

> This section makes clear that the focus of the statute is on anti-competitive conduct in a commercial context. Conferring standing to the full extent implied by the text of § 43(a) would give standing to parties, such as consumers, having no competitive or commercial interests affected by the conduct at issue.... The congressionally-stated purpose of the Lanham Act, far from indicating an express intent to abrogate prudential standing doctrine, evidences an intent to limit standing to a narrow class of potential plaintiffs possessing interests the protection of which furthers the purposes of the Lanham Act.

The court also pointed out that the Lanham Act was passed to codify statutory and common law of unfair competition that had developed before *Erie R.R. v. Tompkins*, 304 U.S. 64, 58

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[45] This language has been part of the Lanham Act since it was enacted in 1946. *See* Pub. L. No. 489, reprinted in 1946 U.S.C.C.A.N. 412, 429.

S.Ct. 817, 82 L.Ed. 1188 (1938).[46] The court analyzed the earlier unfair competition laws and noted that "these earlier acts were drafted against the backdrop of common law doctrine similar to today's prudential standing doctrine that limited the eligible plaintiff class." *Conte Bros.*, 165 F.3d at 230 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982)). This led the court to conclude that "[t]here is no indication that Congress intended in any of the Lanham Act's statutory precursors, or in the Lanham Act itself for that matter, to abrogate the common law limitations on standing to sue."[47] Having found that § 45 of the Lanham Act plainly sets out Congress's intent to maintain prudential standing requirements, we see no need to examine the legislative history or common law background of the Act, as the Third Circuit did. We nonetheless join that court in deciding that Congress did not intend to abrogate prudential standing limitations when it enacted the Lanham Act.

C.

Also of first impression in this court is what test we should adopt in determining whether a plaintiff has statutory or

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[46] *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 861 n. 2, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982) (White, J., concurring) (opining that the "purpose of the Lanham Act was to codify and unify the common law of unfair competition and trademark protection"); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (stating that the "law of unfair competition has its roots in the common-law tort of deceit"); *see generally* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:2 (4th ed.1996) (discussing common-law origins of Lanham Act).

[47] *Conte Bros.*, 165 F.3d at 230 (citing by analogy *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-34, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (describing congressional intent to incorporate common-law principles constraining class of plaintiffs entitled to sue under Clayton Act)).

"prudential" standing under the Lanham Act.[48] After a survey of the caselaw of other circuits,[49] we adopt the test recently set forth in *Conte Bros.*[50] That court adopted the test for prudential standing under the Clayton Act that the Supreme Court set forth in *Associated General Contractors,* 459 U.S. at 538-44, 103 S.Ct. 897,[51] in which the Court identified a number of factors to

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[48] We have stated in *dictum* that consumers should be denied prudential standing under the Lanham Act. *Seven-Up Co. v. Coca-Cola Co.,* 86 F.3d 1379, 1383 (5th Cir.1996) (noting that "most courts that have addressed the issue agree that in light of the pro-competitive purpose language found in § 45, 'consumers fall outside the range of "reasonable interests" contemplated as protected by the false advertising prong of Section 43(a) of the Lanham Act.'" (quoting *Serbin v. Ziebart Int'l Corp.,* 11 F.3d 1163, 1177 (3d Cir.1993))).

[49] Much of our prudential standing jurisprudence in this circuit has focused on whether a particular injurious act is within the "zone of interests" of a particular administrative statute. *E.g., Stockman v. Fed. Election Comm'n,* 138 F.3d 144 (5th Cir.1998); *Asbestos Information Ass'n/North America v. Reich,* 117 F.3d 891 (5th Cir.1997). This is not an administrative law case, however, so standing is not governed by administrative law's "zone of interests" test. *See Clarke,* 479 U.S. at 400 n. 16, 107 S.Ct. 750 (observing that the "zone of interest" test has been applied primarily in claims brought under the Administrative Procedure Act and "is most usefully understood as a gloss on the meaning of § 702 [of that Act].... While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application."); *Bennett,* 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) ("The breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the [APA] may not do so for other purposes.") (citations omitted); *see also* William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 255-63 (1988) (criticizing use of "zone of interest" test outside of administrative context).

[50] Both P&G and Amway used the test from *Conte Bros.* in analyzing whether P&G met prudential standing requirements in pursuing its § 43(a) claim based on Amway's allegedly illegal pyramid scheme.

[51] Although the Third Circuit is the first circuit to use this standing

(continued...)

be considered in determining prudential standing: (1) the nature of the plaintiff's alleged injury: Is the injury "of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws"?; (2) the directness or indirectness of the asserted injury; (3) the proximity or remoteness of the party to the alleged injurious conduct; (4) the speculativeness of the damages claim; and (5) the risk of duplicative damages or complexity in apportioning damages.

The first factor directs us to decide whether the alleged injury is of a type Congress sought to redress in providing a private remedy for violations of the Lanham Act. We conclude that P&G's injury based on Amway's alleged illegal pyramid scheme is not that type of injury. As stated in *Conte Brothers:*

> [T]he focus of the Lanham Act is on "commercial interests [that] have been harmed by a competitor's false advertising," *Granite State Ins. Co. v. Aamco Transmissions, Inc.*, 57 F.3d 316 (3d Cir.1995), and in "secur[ing] to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not." S.Rep. No. 1333, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1275.

Conte Bros., 165 F.3d at 234.

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[51] (...continued)
analysis in the context of the Lanham Act, it noted, 165 F.3d at 233, that two prominent commentaries have endorsed the adoption of the standard. *See* 4 MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:32 n.1 (4th ed. 1996) ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors*...."); Restatement (Third) of Unfair Competition § 3, cmt. f (1995) ("In determining whether an asserted injury is sufficiently direct to justify the imposition of liability, the Supreme Court's analysis of similar issues under federal antitrust law may offer a useful analogy.").

The Lanham Act was enacted to provide protection against the unfair and misleading use of another's trademark.[52] Given this, it seems unlikely that the injury alleged here--fraudulent misrepresentations made to potential employees to convince them to work for and buy from Amway, resulting ultimately in lower sales of some of P&G's products--is of a type that Congress sought to redress in providing the Lanham Act. P&G has alleged attenuated harm arising from the alleged fraudulent inducements but not alleged loss of good will or reputation as a result of Amway's alleged pyramid scheme.

The second factor--directness of the alleged injury--also suggests no standing. This is not the case of one competitor's directly injuring another by making false statements about his own goods and thus inducing customers to switch from a competitor. Rather, the injury is alleged to arise from a competitor's fraudulently inducing a workforce--not necessarily its competitor's--to work for it and sell its product by promises to the workers that they will be handsomely compensated.

There are no allegations that the workers otherwise would have worked for P&G. Instead, the attenuated claimed harm is alleged to come from the fact that an increase in sales of Amway products eventually will lead to lower sales for its competitor. If standing is allowed here, one could argue that any competitor's fraudulent act in running its business that gives it an advantage could be sued upon as a violation of the Lanham Act. Opening up standing to this extent would not be prudent.

The third factor--the proximity of the party to the alleged injurious conduct--also undercuts standing in this case. In *Associated General Contractors,* 459 U.S. at 542, 103 S.Ct.

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[52] *See* S.REP. NO. 79-1333 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1275 (stating that "there is no essential difference between trade-mark infringement and what is loosely called unfair competition").

897, the Court held that "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest ... diminishes the justification for allowing a more remote party ... to perform the offices of a private attorney general." The distributors who are more immediate to the injury than is P&G probably do not have standing to sue under the Lanham Act, which does not give consumers standing to sue. *See Seven-Up,* 86 F.3d at 1383. These distributors could vindicate the public interest, however, by suing for fraud. Thus, there is no need to empower P&G as a private attorney general in this case.

The fourth factor--speculativeness of the damages--also weighs against standing. In fact, P&G did not even attempt to submit evidence on lost profits resulting from Amway's alleged pyramid scheme. In its reply brief, P&G argues that it is not bound to submit such evidence, but that damages instead should be determined based on P&G's relative market share. Given the hundreds of P&G products and potential competitors, as well as the difficulty of determining what percentage of Amway's distributors were fraudulently induced to work for Amway, it is hard to see how any damages awarded would not be highly speculative.

Finally, the fifth factor--the risk of duplicative damages or complexity of apportioning damages--informs us to deny standing. Not only could every competitor in the market sue Amway if P&G is allowed standing here, but there would be nothing to stop other companies not in direct competition with Amway from suing based on harm suffered by having potential workers fraudulently induced away.

This analysis shows that all five factors unanimously (though to various degrees) counsel against granting standing in this circumstance. Granting prudential standing "would result in a great increase in marginal litigation in the federal courts and would not serve the underlying purposes of the Lanham Act--to ferret out unfair competition methods and protect businesses

from the unjust erosion of their good will and reputation." *Conte Bros.*, 165 F.3d at 236.

VII.

The district court dismissed P&G's RICO claims under Fed.R.Civ.P. 12(b)(6). P&G argues that Amway's repetition of the Satanism rumor and its alleged illegal pyramid scheme constitute violations of RICO, 18 U.S.C. § 1962(c) and (d). P&G listed mail fraud and wire fraud as the predicate acts for its RICO claims but does not claim to have relied on any of the misrepresentations that Amway allegedly made via mail and wire. Instead, P&G argues that it is not required to allege and prove reliance. We affirm in part and reverse and remand in part on this issue.

We review *de novo* the dismissal of a complaint for a failure to state a claim for which relief can be granted under rule 12(b)(6). *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir.1993). A claim may not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Benton v. United States,* 960 F.2d 19, 21 (5th Cir.1992). For purposes of our review, we must accept the plaintiff's factual allegations as true and view them in the light most favorable to the plaintiff. *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir.1995).

In civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown: "[W]hen civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation." *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir.2000), *cert. denied,* --- U.S. ----, 121 S.Ct. 896, 148 L.Ed.2d 802 (2001).

P&G points out that in *Summit* we also set out a narrow exception to this rule. "In general, fraud addresses liability between persons with direct relationships--assured by the requirement that a plaintiff has either been the target of fraud or

has relied upon the fraudulent conduct of defendants." *Summit*, 214 F.3d at 561.

Thus, in *Summit* we ruled that a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present.[53] We cited with approval *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir.1994), which "held open the possibility that a plaintiff company may not need to show reliance when a competitor lured the plaintiff's customers away by a fraud directed at the plaintiff's customers." *Summit*, 214 F.3d at 561.

Consequently, P&G's RICO claims based on Amway's alleged spreading of the Satanism rumor to lure customers from P&G are claims on which relief can be granted. P&G has alleged that using the wire and the mail, Amway attempted to lure P&G's customers away by fraud. Although P&G did not rely on the fraud, this falls into the narrow exception carved out by *Summit*, in which we said that "[i]n the current case, for example, the defendants' competitors might recover for injuries to competitive position...." *Summit*, 214 F.3d at 561. Thus, if P&G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation.

P&G's RICO claims for injury based on Amway's alleged illegal pyramid structure cannot meet the requirement that the alleged predicate acts proximately caused P&G's damages, however. Although some Amway distributors may have bought more P&G products "but-for" being lured into joining Amway, injury to P&G did not flow directly from such inducements.

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[53] Although in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), the Court held that simple "but-for" causation is not enough to confer civil RICO standing, that conclusion "is no more than that common law ideas about proximate causation inform the understanding of RICO." *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir.1995).

Further, there are too many intervening factors for proximate causation to be proven here. Allowing RICO claims for such tenuous causation would open floodgates similar to those that we are unwilling to open under the Lanham Act. *See Holmes,* 503 U.S. at 267, 272, 112 S.Ct. 1311. "Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes, id.* at 287, 112 S.Ct. 1311 (Scalia, J., concurring).

We affirm the dismissal of P&G's RICO claims based on Amway's allegedly illegal pyramid scheme, and we reverse the dismissal of the RICO claims based on Amway's spreading of the Satanism rumor. The complaint, as pleaded, does state a claim upon which relief may be granted.

VIII.

The district court erred in dismissing P&G's claim for product disparagement under the Lanham Act and its claims under § 16.29 of the Texas Business and Commerce Code. During trial, P&G argued that Amway had disparaged P&G's Crest toothpaste by alleging that Crest scratches teeth. The district court initially found that "there is evidence in this case that was presented to the jury that the challenge advertisement was literally false. And, so, [the Crest claim] stays under the Lanham Act." Later, however, the court dismissed the remaining claims without addressing the disparagement claim. We review these dismissals *de novo. King v. Ames,* 179 F.3d 370, 373 (5th Cir.1999).

This presents an interesting dilemma. The court first ruled that there was enough evidence to go to the jury on the product disparagement claim, but later dismissed the claim with the rest of the case, without explanation. We are left wondering whether the court inadvertently dismissed the disparagement claim along with the rest of the case or whether, instead, the court realized that there was not enough evidence to go to the jury. Because there is nothing in the record to resolve this

puzzle, we reverse and remand the dismissal of the disparagement claim under the Lanham Act.

Amway argues in its brief that P&G has effectively waived this issue, "since P&G makes no effort in this court to show that it even had a case under either [the product disparagement or the § 16.29] claim ..." (*citing Frazier v. Garrison Indep. Sch. Dist.*, 980 F.2d 1514, 1528 (5th Cir.1993) ("This court is entitled to a reasoned statement of why the district court erred. By the brief nature of their claim, the [appellants] wholly fail to demonstrate any error on the part of the district court.")).

It would have been more helpful if P&G had provided us with more information on the product disparagement claim. It is enough, however, that P&G points out that at one point the district court found that there was enough evidence of disparagement to get to a jury--including evidence that Amway had made a factually false claim that Crest scratches teeth--and then later dismissed the claim without explanation. This alone is sufficient to show reversible error.

As to the § 16.29 claim, the court dismissed it based on its finding that *res judicata* from the Utah case barred the claims against Haugen and Walker, and based on its ruling that P&G was required to prove actual malice to prevail on its Lanham Act claim. The court stated:

> [T]he only other issue that would have been left alive in the case would have been the Section 1629 case under the business of commerce code, which essentially allows for injunctive relief without any of the other claims in the case, the Court dismisses as a matter of law the Section 1629 of the Texas Business & Commerce Code claim for injunctive relief.

Because we are reversing and remanding on *res judicata* and actual malice, the dismissal of which formed the basis for the dismissal of the § 16.29 claim, we also reverse and remand the § 16.29 claim.

IX.

The district court did not err in ruling that P&G's fraud claim was barred by the statute of limitations. P&G alleged a claim of common law fraud against Amway arising from falsely assuring P&G that Amway would help fight the Satanism rumor. The court granted summary judgment to Amway on this issue, finding the claim time-barred. P&G assigns error to this ruling, which we review *de novo. Prytania Park Hotel,* 179 F.3d at 173.

In Texas, the statute of limitations for fraud claims is four years. In *Jackson v. Speer,* 974 F.2d 676, 679 (5th Cir.1992), we explained:

> If, however, the injured party is not aware of the fraud or the fraud is concealed, the statute of limitations begins to run from the time the fraud is discovered or could have been discovered by the defrauded party's exercise of reasonable diligence. *Knowledge of facts that would lead a reasonably prudent person to make inquiry which would lead to a discovery of the fraud is knowledge of the fraud itself.*

(Emphasis added.)

P&G claims that, even exercising reasonable diligence, it could not have discovered the fraud until 1995. Evidence submitted by Amway that was uncontroverted by P&G shows, however, that P&G knew, or reasonably should have known, by the mid-to-late 1980's that it could not rely on Amway's statements that Amway would help stop the Satanism rumor. Gerald Gendall, head of public affairs at P&G, testified that he "thought P&G should have sued Amway almost on a continuous basis." Gendall also stated that after 1983, he did not rely on any representations that Amway was doing all it could to stop the rumor. Executive Vice-President Laco also testified that he believed P&G could have sued Amway for the acts of its distributors in the early to mid-1980's. Finally, John Smale, P&G's CEO from 1981 to 1986, testified:

> Q: When did you first come to the realization that you should have gone after Amway sooner?
>
> A: I don't--I suspect in the--I don't know, towards the late '80s as these rumors continued and as we got more and more lack of response from Amway.

Given this undisputed testimony, a reasonable jury could not have concluded that P&G did not know that it could not rely on Amway's representations that Amway would do all it could to combat the Satanism rumor. P&G's argument that Amway is estopped from arguing that this claim is time-barred because Amway concealed its fraudulent behavior was also correctly dismissed on summary judgment, for the same reason.

X.

We summarize, as follows: The judgment is reversed as to the *res judicata* effect of the Utah judgment. Further, the judgments of the Utah court and the Tenth Circuit do not present any issues of collateral estoppel that bind the Texas court. P&G's Lanham Act claim for disparagement of its commercial activities is remanded for fact-finding to determine whether the primary motivation of the Amway disseminators of the Satanism rumor was economic. If it was, then the speech is commercial; if not, the speech was noncommercial, and no Lanham Act claim is available. The judgment that P&G must prove actual malice to succeed on its Lanham Act claim for disparagement of commercial activities is reversed; no actual malice need be found.

The judgment dismissing P&G's alter ego, single business enterprise, and vicarious liability arguments against Ja-Ri and ADAC is affirmed. The judgment that P&G did not have prudential standing to bring a Lanham Act claim based on Amway's alleged misrepresentations to its own distributors is affirmed. The judgment dismissing P&G's RICO claims based on spreading the Satanism rumor is reversed and remanded.

The judgment dismissing P&G's RICO claims based on Amway's alleged illegal pyramid structure is affirmed. The judgment dismissing P&G's Lanham Act product disparagement claim for the alleged disparagement of Crest toothpaste is reversed, as is the judgment dismissing P&G's Texas Business and Commerce Code § 16.29 claim. Finally, the judgment that P&G's fraud claim is time-barred is affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings in accordance with this opinion.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-20590

The PROCTER & GAMBLE COMPANY; THE PROCTER & GAMBLE DISTRIBUTING COMPANY

Plaintiffs - Appellants

v.

AMWAY CORPORATION, ET AL

Defendants

AMWAY CORPORATION; THE AMWAY DISTRIBUTORS ASSOCIATION COUNCIL, JA-RI-CORPORATION; DONALD R WILSON; WOW INTERNATIONAL INC; WILSON ENTERPRISES INC; RONALD A RUMMEL, Individually doing business as Rummel Enterprises; KEVIN SHINN; RANDY HAUGEN; FREEDOM ASSOCIATES INC; FREEDOM TOOLS INC; RANDY WALKER; WALKER INTERNATIONAL NETWORK; GENE SHAW; JOHN & JANE DOES 6-10, Business Entities; DEXTER YAGER, SR; BIRDLE YAGER; D&B YAGER ENTERPRISES INC.

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 2/24/01, 5 Cir., 2001, 242 F.3d 539)

Before SMITH and DENNIS, Circuit Judges, and ROETTGER*, District Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of this court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

*United States District Judge sitting by designation.

APPENDIX D

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution states, in pertinent part, that "Congress shall make no law. . . abridging the freedom of speech, or of the press."

The Lanham Act states in pertinent part:

15 U.S.C. § 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The Texas Business and Commerce Code states in pertinent part:

16.29. Injury to Business Reputation or Trade Name or Mark

A person may bring an action to enjoin an act likely to injure a business reputation or to dilute the distinctive quality of a mark registered under this chapter or Title 15, U.S.C., or a mark or trade name valid at common law, regardless of whether there is competition between the parties or confusion as to the source of goods or services. An injunction sought under this section shall be obtained pursuant to Rule 680 *et seq.* of the Texas Rules of Civil Procedure.

Supreme Court, U.S.
FILED
AUG

No. 01-29

IN THE

Supreme Court of the United States

AMWAY CORPORATION, RANDY HAUGEN, DEXTER YAGER, SR., RANDY WALKER and DONALD R. WILSON,

Petitioners,

v.

THE PROCTER & GAMBLE COMPANY and THE PROCTER & GAMBLE DISTRIBUTING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6 AND PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.6, respondent The Procter & Gamble Company states that it is a publicly traded corporation with no parent corporations and that no publicly held company owns 10% or more of its stock. Respondent The Procter & Gamble Distributing Company is a wholly owned subsidiary of The Procter & Gamble Company.

Furthermore, petitioners purport to list defendants below who are not among the petitioners. Their list is incomplete. The court of appeals reversed the dismissal of claims that were asserted not only against petitioners/defendants/ appellees Amway Corporation, Randy Haugen, Randy Walker, Dexter Yager, Sr., and Donald R. Wilson, but also against Ja-Ri Corporation, Amway Distributors Association Council, and Internet Services Corporation, who are not among the petitioners.

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INTRODUCTION

Petitioners seek review of the Fifth Circuit's decision reversing the dismissal of respondents' Lanham Act Section 43(a) claim and remanding the case for further proceedings, including fact-finding to determine whether the "actual malice" standard applies in this case. Respondent Procter & Gamble Company ("P&G") seeks to hold petitioners liable for the dissemination of an irresponsible, fabricated rumor linking P&G, their chief competitor, with the Church of Satan and Satanic worship.

Petitioners cite as reasons for granting review: (1) "conflict," "confusion," and "uncertainty" among the courts of appeals caused, they say, by the "inconsistency and indeterminacy" of this Court's "commercial speech" decisions (Petition, pp. 1, 7); (2) the Fifth Circuit's "perverse" total reliance on the speaker's "subjective" "economic motivation" in deciding whether the "actual malice" standard applies (*id.* at 6, 15-17, 27); and (3) the notion that this case involves an expression of religious conviction that must be protected under the First Amendment (*id.* at 17, 19). Like petitioners' rumor that lies at the heart of this case, their reasons are wholly fictitious.

There are no genuine disagreements of significance among the courts of appeals; the Fifth Circuit properly applied the correct definition of "commercial speech" prescribed by this Court; and the "expression" on which petitioners base their First Amendment argument was nothing more than a blatant commercial pitch vilifying a competitor and urging recipients to buy Amway products only and, thereby, to foster the Amway business. Its false and venomous content bears no resemblance to a statement of religious conviction or to any other form of protected speech. Nothing in this case warrants this Court's attention and review should be denied.

STATEMENT OF THE CASE

P&G, a consumer goods manufacturer, brought this action against Amway Corporation ("Amway"), certain key Amway distributors, and the Amway Distributors Association Council ("ADAC") challenging defendants' fraudulent and deceptive marketing practices. These practices include falsely associating P&G and its products with Satan ("the Satanism rumor"), falsely claiming that use of certain P&G products would injure consumers or damage their property ("the product disparagement"), and fraudulently inducing individuals to participate in a pyramid distribution system by promising that they would become wealthy if they became Amway distributors, bought Amway products and motivational tools, and recruited others to do the same ("the pyramid scheme").

P&G and Amway are manufacturers of household products such as laundry detergent, toothpaste, and cleaners. Trial Transcript ("T.T.") 403. P&G is Amway's primary competitor. P&G Trial Exhibit ("T.E.") 1310, pp. AMT40568, AMT40576, AMT40580. Founded in 1837, P&G sells products such as Tide laundry detergent, Crest toothpaste, Folgers coffee, Pringles snacks, Cascade and Dawn dishwashing products, Pampers diapers, and Ivory Soap at retail grocery stores, drug stores, and mass merchandisers. Compl.; T.E. 235.

Founded in 1959, Amway sells its products only through individuals who are recruited as "distributors." T.E. 63, 1605, 1892. Distributors are urged continuously to recruit others to join the pyramidal chain of "downline" distributors. P&G Summary Judgment Opposition ("MSJ Opp."), Exh. A50, p. 104 (Doc. 278-84); T.E. 438, 1892, p. AM0023683. Amway has approximately one million United States distributors; at least 400,000 leave the organization each year. T.T. 1712. Thus, Amway distributors must recruit

continuously to sustain the pyramid structure. A distributor's primary purpose is to recruit more distributors and to sell them "motivational" tapes produced by high-level distributors and tickets to Amway "rallies." MSJ Opp., Exhs. A50, p. 104, A53; T.E. 1892, pp. AM0023683, AM0023692, AM0023695. Distributors are told not to sell Amway products to consumers, but only to themselves and other distributors. MSJ Opp., Exh. A50, pp. 23, 36. More than 73% of the distributors make no sales outside Amway. *Id.* at Exh. A59, pp. AMT035628, AMT035631. Only 12% of Amway product sales are outside Amway, *id.* at p. AMT035636; the remaining 88% of sales take place within the Amway distributor organization. *Id.*

A. The Satanism Rumor

In the early 1980s, P&G began receiving reports that Amway distributors were circulating the Satanism rumor. T.E. 671, 753. The rumor falsely related that P&G's president had stated on a well-known TV talk show that he had decided to admit that he worshiped Satan and that a portion of P&G's profits were given to the Church of Satan. T.E. 274, 327-29, 331, 333, 335, 337, 338, 342; MSJ Opp., Exhs. A3, A5, A6. The rumor falsely attributed to the president a lack of concern whether consumers knew of the association between P&G and Satanism, fabricating a quote from him saying "there are not enough Christians in the United States to make a difference." *Id.* The rumor, usually in a written flier, listed more than 40 P&G products and called for a boycott. *Id.* It told recipients to check products for a moon and stars logo, which is P&G's trademark, falsely stating that it is a Satanic symbol. *Id.* A high-level Amway distributor once told an Amway rally:

> Well, let me tell you what the President of Procter & Gamble said on the Donahue Show . . . nationwide television. He said he works with

> Satan. . . . He said "there ain't enough Christians in this country to hurt me." (loud murmurs from crowd). And let me tell you what else he said, he said Satan's signature is on every . . . Procter & Gamble product . . . . For you know about the President of Procter & Gamble on the Donahue show telling a hundred and forty million people that "I worship SATAN!" You didn't even know about it! And it's a fact! It's true! I couldn't set [*sic*] up here and say it's true if it wasn't true, and it's true!

MSJ Opp., Exh. A6.

The Satanism rumor is a complete fabrication. *Id.* at Exh. A86; T.E. 235. P&G's president has never been on the Donahue Show. Neither its president, nor any other P&G representative, has ever made statements associating P&G with the Church of Satan. *Id.* P&G has never donated money to anything affiliated with a Satanic church. *Id.* In fact, P&G's logo of the "Man in the Moon" and stars was adopted more than a hundred years ago to distinguish P&G's goods, using then-popular symbols, at a time when many vendors, purchasers, and others who handled goods were unable to read. *Id.* The trademark symbolizes the high quality of P&G products. T.E. 936. Amway has admitted that the Satanism rumor is "false," "malicious," and "vicious." MSJ Opp., Exhs. A36, A17; T.E. 615, 946, 1490.

Although it could have, Amway did not take effective measures to stop its distributors from spreading the rumor. *Id.* at Exh. A23; T.E. 788 (Amway was advised internally to deny the rumor to all distributors every six months, due to the "passing parade of distributors," but it refused). Consequently, distributors continued to spread the rumor throughout the 1980s and early 1990s. MSJ Opp., Exhs. A7, A13, A20, A21, A37, A81.

In April 1995, a major outbreak of the Satanism rumor occurred when Executive Diamond distributor Randy Haugen broadcast an audio version of it on Amway's "AMVOX" telephone message system, which interconnects virtually the entire Amway system. *Id.* at Exh. A5; T.E. 19.[1] Preceded by the recorded voice of Haugen telling distributors "This is Randy. Double your numbers," the audio version of the rumor gave a new date for the imaginary Donahue Show appearance, March 1, 1995. *Id.* It named 44 P&G products, urged a boycott of them, and invited recipients to call the Donahue Show for a transcript of the interview. *Id.* Then it added:

> I tell ya, it really makes you count your blessings to have available to all of us a business that will allow us to buy all the products that we want from our own shelf and I guess my real question is, if people aren't being loyal to themselves and buying from their own business, then whose business are they supporting and who are they buying from.

Id.

Haugen never presented this as a rumor. To the contrary, he told the distributors this was a "great message." *Id.* He sent the message to his "frontline" distributors in Utah, Arizona, Minnesota, Oregon, California, and Texas. T.T. 1780-84. It proceeded through Haugen's network of distributors. T.T. 1856; T.E. 1487. One distributor two levels below Haugen on the pyramid, who testified that distributors were taught to "edify" their "uplines" and never question

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1. Amway's elite Direct Distributors are ranked in ascending order: Pearl, Ruby, Emerald, Diamond, Double Diamond, and Executive Diamond. T.E. 63, pp. AM2825-AM2831. Haugen was and still is at the highest level of the pyramid.

them, sent the message to 200-300 distributors downline from him. T.T. 1856. Another distributor forwarded the message with the comment that it was "just really phenomenal. I think it would benefit everybody." MSJ Opp., Exh. A5; T.E. 19. Internal Amway documents state that the rumor was "running rampant" in Haugen's group, which consists of more than 100,000 distributors. *Id.* at Exh. A19; T.T. 1773, 1863; T.E. 1550, 2350. At that point, not only was the Satanism rumor coming from the highest levels of Amway, it literally was cascading around the country.

Other Amway representatives circulated a written version of the rumor in 1995, appending to it a cover page showing a skull and crossbones, a symbol indicating "thumbs down" on "all P&G products," and the Amway representatives' telephone numbers, with the statement: "We offer you an alternative." MSJ Opp., Exhs. A3, A4; T.E. 1537A. One distributor admitted she used the Satanism rumor to recruit others to join Amway and sell its products. MSJ Opp., Exh. A4.

After learning of Haugen's widespread transmission of the rumor, Amway considered telling its distributors that it was false, but decided not to do so. *Id.* at Exh. A22; T.E. 1546. Haugen sent another AMVOX message purporting to retract the rumor, but an internal Amway document reveals that a month later the company knew the retraction did not reach everyone who received Haugen's original transmission. T.E. 1620. In fact, Amway learned Haugen's message had spread into other large distributor organizations. *Id*; T.E. 1564. Nevertheless, Amway did not send a message to distributors informing them that the rumor was false until after P&G initiated litigation. MSJ Opp., Exh. A83.

Amway's rules authorize it to terminate or discipline distributors for improper conduct, T.E. 63, 265 (distributor terminated for disparaging competitor's product), but

the company has never disciplined any distributor for spreading the Satanism rumor. Rather than punish Haugen, Amway awarded him its prestigious Founders Achievement Award bonus of $25,000 in 1995 for conduct that Amway characterized as ethical. T.E. 1451, 1651.

The Satanism rumor has resulted in thousands of consumers calling or writing to P&G, many stating they were appalled or outraged and no longer would purchase P&G products. MSJ Opp., Exh. B1; T.E. 123, 208, 1600, 1603, 2351. In April and May 1995 alone, more than 5,000 people contacted P&G about the Satanism rumor; this is precisely when Haugen's message was running rampant. T.E. 111, p. B001501. P&G's expert economist calculated that from March 1995 to August 1997, P&G lost sales on Tide, Pampers, and Crest totaling $49.5 million due to the rumor. MSJ Opp., Exhs. A11, A12. Amway itself admits it has "cost P&G millions to fight this rumor." *Id.* at Exh. A9; T.E. 1047.

B. The District Court Proceedings

P&G filed its initial complaint on July 16, 1997 (Doc. 1). In its Second Amended Complaint, P&G alleged claims including violation of Lanham Act Section 43(a), 15 U.S.C. § 1125(a),[2] defamation, violation of the Racketeer

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2. In relevant part, Section 43(a) of the Lanham Act makes actionable any "false or misleading representation of fact" by "any person" "which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities . . . ." A plaintiff may base a claim on the "goods" prong, the "services" prong, and/or the "commercial activities" prong of Section 43(a), and it may allege that the defendant misrepresented the plaintiff's and/or the defendant's goods, services, or commercial activities. In this action, P&G invoked the "goods" and "commercial activities" prongs and alleged that defendants misrepresented not only P&G's goods and commercial activities, but their own as well.

Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d), and violation of Texas Business & Commerce Code Section 16.29, which provides for injunctive relief. The complaint sought to impose direct liability on the defendants who actually disseminated the Satanism rumor (Haugen, Walker, and some of their "downlines") and vicarious liability on those who had control over the disseminators (Amway, Haugen, and other high-level distributors). The district court dismissed, *inter alia*, the RICO claims under Rule 12(b)(6), Order, November 12, 1998 (Doc. 156), and later denied reconsideration. Order, February 12, 1999 (Doc. 245).

On two occasions before trial, Amway requested a stay, arguing that this action was identical to one P&G had filed in the United States District Court in Utah against Amway and certain distributors based solely on their 1995 dissemination of the Satanism rumor.[3] The Texas district court denied a stay because the Texas action involved parties and claims that were not in the Utah case. Orders, January 5, 1998 and November 12, 1998 (Doc. 77 and 156). The Utah action was dismissed on April 1, 1999.[4] On April 7, 1999, Amway moved for leave to seek summary judgment as to the entire Texas action on the ground the Utah court's decision was *res judicata*. Motion for Leave to File Supplement to Motion for Summary

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3. P&G filed the Texas action after two defendants, both Texas residents, sought dismissal from the Utah action for lack of personal jurisdiction. The latter action did not include any claims based on product disparagement, the pyramid scheme, RICO, or Texas law, or any Lanham Act claim based on Amway's misrepresentations about its own commercial activities.

4. P&G appealed to the Tenth Circuit on April 2, 1999. On August 23, 2000, the Tenth Circuit reversed the dismissal of P&G's Lanham Act claim and state tortious interference claim. *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000).

Judgment (Doc. 296, 300). The district court denied the motion. Order, April 16, 1999 (Doc. 304).

Trial commenced on May 3, 1999 and continued for two weeks. On May 13, 1999, after P&G rested, defendants moved for judgment as a matter of law under Rule 50(a) ("JML") (Doc. 409, 410, 414). The district court ruled that P&G was required to prove actual malice as an element of its Lanham Act claim, T.T. 2274, but held that P&G had offered sufficient evidence of actual malice to permit the claim to go to the jury and rejected that as a ground for JML. *Id.* at 2307.

In its Rule 50(a) motion, Amway reasserted *res judicata* as to the entire action (Doc. 410). P&G pointed out that the court previously had denied Amway's request for dismissal on that basis. T.T. 2107. However, the court indicated it had not ruled on the merits of the *res judicata* argument and deferred consideration of it until defendants rested. T.T. 2107-08. By that time, the only remaining claims were the Lanham Act Section 43(a) claims based on the Satanism rumor and product disparagement and the claim for violation of Texas Business & Commerce Code Section 16.29.[5] The remaining defendants were Amway and high-level distributors Randy Haugen, Randy Walker, Dexter Yager, and Donald Wilson. P&G had presented sufficient evidence to hold Haugen and Walker directly liable for disseminating the Satanism rumor, Amway directly liable for product disparagement, and all of them vicariously liable for the dissemination of the Satanism rumor by their "downline" distributors.

Defendants rested on May 14, 1999 and closing arguments were scheduled for the following Monday, May 17. The court interrupted the schedule, however, to conduct

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5. The district court granted JML on the defamation claim on grounds unrelated to actual malice (*e.g.*, statute of limitations).

what became a two-day hearing on *res judicata*. At its conclusion on May 15, 1999, the court issued three rulings disposing of the claims that had survived defendants' Rule 50(a) motion two days earlier. First, the court held that *res judicata* barred *direct* liability against Amway, Haugen, and Walker. T.T. 2766. Second, the court concluded that P&G had *not* presented sufficient evidence of actual malice to hold defendants *vicariously* liable for the dissemination of the Satanism rumor *by the "downline" distributors*. T.T. 2838-39. Third, the court dismissed the Section 16.29 claim without stating a reason. *Id.* The court entered final judgment against P&G. Amended Final Judgment (Doc. 425). P&G filed a timely notice of appeal on June 15, 1999 (Doc. 447).

C. The Court of Appeals Decision

Because the Tenth Circuit reversed the Utah judgment in *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000), the Fifth Circuit reversed the district court's decision according preclusive effect to that judgment. App. 13a, 54a. It also reversed the district court's decision requiring P&G to prove actual malice, holding instead that on remand the district court would have to make further factual findings, dictated by this Court's "commercial speech" cases, in order to determine whether P&G is required to satisfy the "actual malice" standard.[6] App. 16a-35a. The court of appeals also denied a petition for panel rehearing and rehearing *en banc*.

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6. The Fifth Circuit also held that the district court erred in dismissing P&G's Lanham Act claim based on Amway's disparagement of Crest toothpaste, App. 51a-52a, P&G's fraud-based RICO claim, *id.* at 50a, and its injunctive claim under Texas Business & Commerce Code Section 16.29, *id.* at 51a-52a. Because the Petition does not challenge the Fifth Circuit's grounds for reversing those dismissals, we do not address them in this Brief.

REASONS FOR DENYING THE WRIT

I. THERE IS NO GENUINE DISAGREEMENT AMONG THE CIRCUITS OVER THE PROPER TEST FOR DETERMINING IF A SPECIFIC INSTANCE OF SPEECH IS "COMMERCIAL." THE FIFTH CIRCUIT'S THREE-PART TEST IS COMPLETELY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND OF THE OTHER COURTS OF APPEALS THAT HAVE ADDRESSED THE SAME ISSUE.

Petitioners feign the existence of "confusion," "uncertainty," and "conflict" among the courts of appeals over the proper test for determining if specific speech constitutes "commercial speech." Petition, pp. 1, 7-8.[7] In an attempt to attract this Court's attention, petitioners argue that the Court must reconcile the "three different tests for determining whether speech is 'commercial.' " *Id.*, citing, *inter alia*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S. Ct. 1817 (1976), *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 564, 100 S. Ct. 2343 (1980), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875 (1983). A review of recent decisions by the circuits in question reveals that there is no meaningful uncertainty concerning the proper test for determining whether particular speech is "commercial."

At various points, petitioners imply that the Fifth Circuit held that a speaker's subjective economic motivation alone can determine whether the "actual malice" standard applies.

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7. Petitioners displayed no such "confusion" before the district court, citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875 (1983) as the source for the definition of "commercial speech." Amway Corporation's Motion for Summary Judgment, p. 36.

Petition, p. 27 ("When that court's two holdings are combined, speech at the *core* of the First Amendment can be deemed 'commercial' based on the speaker's motivation, and then deprived of all First Amendment protection for that reason alone."); *see also* Petition, pp. 6, 15, 16. These characterizations distort the Fifth Circuit's opinion by leaving the misleading impression that it failed to consider other factors it was required to weigh. App. 24a-27a.

A. The Fifth Circuit Properly Applied The Test Prescribed in *Bolger*.

The court of appeals held that the "actual malice" standard would not apply if the Satanism rumor constitutes "commercial speech." App. 35a. In determining if the Satanism rumor constitutes commercial speech, the Fifth Circuit began by noting the "core notion" of commercial speech first described in *Virginia State Bd.*, *supra*, 425 U.S. at 762, namely "speech that merely proposes a commercial transaction." App. 18a. Acknowledging that this "core notion" has not been treated as the sole embodiment of commercial speech, *Bolger*, *supra*, 463 U.S. at 66, the Fifth Circuit compared the two salient variants of Amway's Satanism rumor (*i.e.*, the fliers and the AMVOX message) with this Court's broader, more detailed descriptions of commercial speech. App. 20a-24a. The court of appeals carefully compared Amway's versions of the rumor to the four characteristics of prototypical commercial speech that, according to this Court, make it amenable to limitation. *Id.* These characteristics are precisely the same ones that the Third Circuit used in *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 933-37 (3d Cir.), *cert. denied*, 498 U.S. 816, 111 S. Ct. 58 (1990), to determine if the speech at issue in that case was "commercial." *Id.* at 20a-21a.

Finding that it could not determine from these characteristics whether the Satanism rumor was commercial

or noncommercial speech, *id.* at 24a, the Fifth Circuit turned to the three-part *Bolger* test, which this Court adopted and consistently has used to determine if "a specific instance of speech is commercial":

> (i) whether the communication is an advertisement, (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech.

Id. at 24a (citing *Bolger*, *supra*, 463 U.S. at 67).

Contrary to petitioners' characterization, the Fifth Circuit did not "employ[ ] a loose variant of the *Bolger* test." Petition, p. 9. True to *Bolger*, the court did not treat any single factor as determinative, but analyzed all of them within the limited record before it. App. 24a-28a. The Fifth Circuit "easily" found that the fliers containing the Satanism rumor and listing P&G's products, which Amway distributors printed and gave to customers, clearly satisfied all three factors and, thus, constituted commercial speech. *Id.* at 24a n.25.

The court of appeals found defendants' AMVOX version of the rumor more difficult to analyze only because of the limited record before it. App. 24a-25a. Concluding that the second *Bolger* factor (*i.e.*, product references) was "easily satisfied," *id.* at 25a, the court observed that "[t]he first factor . . . seems to collapse into the third factor in this case," and the third factor "has not yet been decided by the trier of fact, so we remand for that to be done." *Id.* Thus, the Fifth Circuit indicated that evidence could be adduced to help the trier of fact determine whether Haugen's AMVOX version of the rumor was commercial or noncommercial speech. *Id.* at 27a-28a. If ultimately classified as commercial, the "actual malice" standard would not apply; if noncommercial, it would apply. *Id.* at 33a-35a.

Thus, contrary to petitioners' characterization, the court did not disregard or relax any of the *Bolger* factors. As to the written fliers, the court mentioned each factor individually and explained why each was satisfied. The only difference in its analysis of the AMVOX message was that it deemed the current record insufficient to apply the third factor with certainty and was unwilling to surmise petitioners' motivation absent a factual finding. Thus, the remand was completely appropriate and renders review at this juncture completely premature. *See* Section III, *post*.

B. The Courts Of Appeals Are Not Split Over The Propriety Of Considering A Speaker's Economic Motivation. Indeed, *Bolger* Mandates It.

Even though *Bolger* held that economic motivation, in combination with the other two factors, must be used to decide if specific speech is "commercial," petitioners challenge the Fifth Circuit's consideration of that factor in determining whether the "actual malice" standard applies.[8] Constructing a classic "straw man," petitioners recast the Fifth Circuit's careful analysis of the third *Bolger* factor and accuse that court of elevating it to preeminent status. They argue that treating the speaker's economic motivation as determinative conflicts with decisions of the Seventh and Ninth Circuits, and further suggest that those circuits have applied only the "core notion" of "commercial speech" (*Virginia State Bd., supra*) in their decisions. Petitioners even hint that those circuits have applied the "actual malice" standard to speech that the Fifth Circuit would consider "commercial" under the *Bolger* test.

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8. The Tenth Circuit also applied the *Bolger* test, including the third factor, to the very same AMVOX message. *Procter & Gamble Co. v. Haugen*, *supra*, 222 F.3d at 1274.

1. A review of the Seventh and Ninth Circuit opinions cited by petitioners and of the Fifth Circuit's decision shows no salient difference in the way those courts determine "commercial speech" and demonstrates that the law on this subject is not in disarray, confusing, or in need of this Court's intervention.

Petitioners argue that the Fifth Circuit's decision cannot be reconciled with *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986). In *Woods*, the Seventh Circuit acknowledged that Indiana case law required application of the "actual malice" standard to the defendant newspaper's allegedly defamatory column. *Id.* at 483. In response to the plaintiff television station's contention that it was the defendant's competitor and that the First Amendment would not protect "commercial defamation," the Seventh Circuit responded simply that "[t]he present case is governed by state, not federal law," and that state law made no exception for defamatory statements by competitors. *Id.* at 484. Thus, the Seventh Circuit's observation, in *dictum*, that "the June 22 column simply cannot be characterized as commercial speech," *id.*, was not a pronouncement on the scope of the First Amendment's protections, much less a signal that the Seventh Circuit rejects (as, of course, it cannot) the *Bolger* test (or at least its third factor) and limits commercial speech to *Virginia State Bd.'s* "core notion." Indeed, even before *Bolger* was decided, the Seventh Circuit correctly predicted that this Court would not limit commercial speech "to the mere proposal of a particular commercial transaction . . . ." *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 570 F.2d 157, 163 (7th Cir. 1978).

Petitioners point to *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999), as proof that the Ninth Circuit has refused to apply *Bolger's* test for commercial speech. Although petitioners candidly admit that

the *Thomas* panel opinion was superseded by an *en banc* decision, 220 F.3d 1134 (9th Cir. 2000), and thus represents only "persuasive authority" in the Ninth Circuit, the rest of their characterization of the vacated opinion is less than candid. Although that opinion interpreted *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505 (1993), as casting doubt on *Bolger* (*see Thomas* panel opinion, *supra*, 165 F.3d at 710), it nonetheless articulated the *Bolger* test clearly and applied it easily, concluding that all three *Bolger* characteristics were absent and, thus, the speech could not be considered "commercial" under this Court's test. *Id.* at 710-11.

Other Ninth Circuit decisions have applied *Bolger's* commercial speech test just as easily and without hesitation, confusion, or uncertainty. *See, e.g., Association of National Advertisers v. Lungren*, 44 F.3d 726, 728-29 (9th Cir. 1994). Other court of appeals decisions applying the *Bolger* test — many of which petitioners cite — display none of the doctrinal confusion claimed by petitioners. *See, e.g., Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999) (applying *Bolger* in a Lanham Act case); *Semco v. Amcast*, 52 F.3d 108, 112-13 (6th Cir. 1995); *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority*, 148 F.3d 242, 247 (3d Cir. 1998); *Bad Frog Brewery v. New York State Liquor Authority*, 134 F.3d 87, 97 (2d Cir. 1998). In short, there is no doctrinal confusion in existing jurisprudence and no reason to grant certiorari in this case.

2. The Fifth Circuit decision did not elevate "economic motivation" to preeminent status among the three *Bolger* factors.

Petitioners contend that the Fifth Circuit distorted *Bolger* by placing undue emphasis on the speaker's "economic motivation," which they suggest creates a division among

the circuits. They seem to contend that, because the court of appeals was not convinced that the AMVOX message satisfied the first *Bolger* factor (it "was not an advertisement in the classic sense," App. 25a), the court's conclusion that the message still could be commercial speech meant that it was improperly treating the third *Bolger* factor as preeminent.

Petitioners have no basis for that characterization, much less their suggestion of a disagreement among the courts of appeals. The Fifth Circuit stated that the speaker's economic motivation is "determinative" in the context of this case merely because "the other two *Bolger* factors are not conclusive." App. 27a. That is, the court found the second factor (product references) clearly satisfied, but believed the first factor (advertisement) may or may not be met, depending on the resolution of the third factor (economic motivation), which made remand necessary.[9] The Fifth Circuit did not rule out that the AMVOX message could be deemed an advertisement on remand, after further factual development. App. 25a. To the contrary, it stated explicitly that, depending on the resolution of the "economic motivation" factor when the case returns to the district court, the message "could be considered as a negative advertisement against P&G . . . ." *Id.*[10] Thus, petitioners' argument mischaracterizes the Fifth Circuit's application of the *Bolger* factors in an attempt to

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9. The Fifth Circuit made a special point to "stress that we are not shortening the *Bolger* test to a single factor . . . ." App. 26a-27a.

10. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S. Ct. 1912, 1919 (1978) (expression concerning commercial transactions may constitute "commercial speech" warranting less constitutional protection, notwithstanding that it is carried out in a more limited or private setting; it actually may be more harmful to the public's interest in the "free flow" of truthful "commercial information" than that which takes place through an open, public advertisement).

create the appearance of a disagreement among the circuits.[11] Indeed, the Fifth Circuit's treatment of this point demonstrates how unique and fact-dependent this case is and illustrates why review by this Court is inappropriate.

3. The Fifth Circuit decision does not require intrusive inquiries that could encroach on a speaker's freedom of conscience.

Petitioners object to the Fifth Circuit's emphasis on *Bolger's* "economic motivation" factor because they claim that it forces a speaker to "endure" "an intrusive inquiry into [his] subjective motivations" that inevitably invades "his freedom of conscience . . . ." Petition, pp. 13, 17. Again, in order to attract the Court's attention, they suggest that this is a new requirement that creates a division among the circuits.

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11. Even beyond their argument's factual inaccuracy, it is inconsistent with *Bolger*. It suggests that a court could not conclude properly that the AMVOX message was commercial speech unless convinced that it was an "advertisement," a term that petitioners apparently interpret only in its narrow traditional sense. Petition, p. 12 (accusing the Fifth Circuit of detaching the commercial speech doctrine from "its advertising moorings"). In *Bolger*, the Court set forth three "characteristics" of commercial speech, adding that "the combination of *all* these characteristics . . . provides strong support" for concluding that the speech is commercial. *Bolger*, *supra*, 463 U.S. at 67 (emphasis original). The Court made it clear, however, that not every characteristic "must necessarily be present in order for speech to be commercial." *Id.* at n.14. Thus, the court of appeals did not depart from *Bolger* by concluding that the AMVOX message could be commercial speech even if not an advertisement in the traditional sense. App. 25a. Indeed, it is petitioners who are departing from *Bolger* by asking the Court to hold that a traditional advertisement is the *sine qua non* of commercial speech. *Bolger* at n.14. As this Court has held, commercial speech is not so neatly differentiated from noncommercial speech; often the difference "is a matter of degree." *Discovery Network*, *supra*, 507 U.S. at 423.

Nothing in *Bolger* or the court of appeals decision requires any intrusion or invasion that is inimical to the First Amendment. The Fifth Circuit stated that any relevant evidence may be used "in determining whether, as matter of fact, those who circulated the Satanism rumor via AmVox acted out of economic motivation." App 28a. Although a speaker may wish to offer evidence of his or her subjective motives — Haugen never did so in his trial testimony — the Fifth Circuit emphasized only *objective* indicia of the speaker's motivation. For example, the court of appeals deemed "Amway's unique structure" relevant to the determination on remand, including

> the fact that Amway distributors make money not simply by selling Amway products to the public, but also by recruiting other distributors into the organization, who become "downline" distributors, and upon whose sales the "upline" distributors then get commissions.

App. 27a. Moreover, even if a speaker had to answer questions about his subjective motivations in order to allow a court to make a "commercial speech" determination, that would be no more intrusive or inimical to the First Amendment than requiring him to state whether he knew his statement was false or harbored serious doubts about its truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 725-26 (1964); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 n.30, 104 S. Ct. 1949, 1965 (1984). Thus, petitioners' contentions have all the trappings of a makeshift that has no relevance to the facts of this case.

C. Every Court Of Appeals That Has Addressed The Issue Has Concluded That This Court's "Commercial Speech" Analysis Applies Not Only To Direct Government Regulation Of Speech, But To Private Actions As Well.

In addition to challenging the Fifth Circuit's consideration of "economic motivation" as prescribed in *Bolger*, petitioners urge the Court to reject altogether the appellate court's application of this Court's "commercial speech" analysis to the question whether the "actual malice" standard applies in this case. They argue that the "commercial speech" analysis ought to apply only to "direct government regulation of speech" and that there is no precedent or reasonable basis for applying it in a civil action, such as one predicated on Lanham Act Section 43(a).

The only other court of appeals to consider this question — the Third Circuit in *U.S. Healthcare* — reached exactly the same conclusion as the Fifth Circuit. Both *U.S. Healthcare* and the Fifth Circuit's decision are well reasoned and well grounded in this Court's "commercial speech" jurisprudence. The Fifth Circuit opinion quoted the Third Circuit's reasoning at length on this issue, noting that

> the court "believe[d] the subordinate valuation of commercial speech is not confined to the government regulation line of cases[,]" but instead should extend to defamation and Lanham Act cases as well.

App. 17a (quoting *U.S. Healthcare*, *supra*, 898 F.2d at 932). The Fifth Circuit noted that the Third Circuit had relied on language from Supreme Court decisions stating that commercial speech " 'may be regulated in ways that might be impermissible in the realm of noncommercial expression' " and added:

> Based on this language, the *U.S. Healthcare* court concluded that the lesser protection commercial speech receives from direct government regulation also must apply to private actions for defamation and the like. We agree. If commercial speech receives less protection from government regulation, then it also should receive less protection from private suits, which are not much more likely than are government regulation to infringe on those values the First Amendment seeks to protect. Furthermore, private suits can be a form of government regulation.

App. 18a.

Petitioners fail to explain why the commercial speech analysis cannot be applied just as reasonably to private actions as it is to government regulations. To the contrary, the Fifth Circuit's and the Third Circuit's reasoning is consistent with this Court's recognition that the indirect pressures that private suits can exert are comparable to the pressures fostered by government regulations. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 625 (1984); *cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86, 108 S. Ct. 1704, 1712 (1988). The consistency of the limited precedents on this subject indicates that this case is not appropriate for further review.

II. THERE IS NO GENUINE DISAGREEMENT AMONG THE CIRCUITS OVER WHETHER THE "ACTUAL MALICE" STANDARD APPLIES TO SPEECH PROPERLY CLASSIFIED AS "COMMERCIAL." EVERY CIRCUIT TO SPEAK TO THE QUESTION HAS HELD THAT IT DOES NOT APPLY.

Petitioners also suggest there is a controversy that this Court must resolve concerning whether the "actual malice"

standard applies to speech classified as "commercial." But this controversy proves as illusory as the others. Three courts of appeals have addressed that issue directly[12] and reached the same conclusion — it does not apply.

In addition to the Fifth Circuit's holding in this case, the Third Circuit held, in a carefully reasoned opinion, that, when false commercial speech is involved, the "heightened protection of the actual-malice standard is not 'necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.'" *U.S. Healthcare*, *supra*, 898 F.2d at 937. Recently, in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), the Ninth Circuit agreed, holding that,

> [w]hen speech is properly classified as commercial, a public figure plaintiff does not have to show that the speaker acted with actual malice. *See Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 556 (5th Cir. 2001) ("Supreme Court precedent prevents us from importing the actual-malice standard into cases involving false commercial speech.").

Id. at 1185.[13]

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12. In *Porous Media Corp.*, *supra*, 173 F.3d at 1119-20, the Eighth Circuit avoided that constitutional issue by concluding that the predicate for applying the "actual malice" standard, the plaintiff's "public figure" status, had not been established.

13. There is no conflicting authority of equal dignity warranting this Court's intervention. The only contrary views cited by petitioners are contained in a Delaware superior court opinion and a Maryland district court opinion (Petition, p. 24), which the Fifth Circuit acknowledged but did not follow, concurring instead with the Third Circuit's decision in *U.S. Healthcare*. App. 31a-33a.

It is significant that the Third, Fifth, and Ninth Circuits all reached that conclusion in the Lanham Act context, Section 43(a) of which proscribes false or misleading "commercial speech." *Seven-Up Co. v. Coca-Cola, Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996) (Section 43(a) applies only to "commercial speech").[14] This Court consistently has held that commercial speech must be truthful to qualify for full First Amendment protection. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, *supra*, 447 U.S. at 566; *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 1925 (1999). In fact, the Lanham Act's legislative history makes clear that the Act purposely was drafted to apply only to false or misleading commercial speech, in order to avoid infringing First Amendment rights.[15] *Seven-Up*, *supra*, 86 F.3d at 1383-84 n.6. Not only is the "breathing space" provided by the "actual malice" standard unnecessary in this context, applying it when large corporate plaintiffs such as P&G assert Section 43(a) claims would radically alter practice under the Lanham Act, severely limiting access to its protections.[16]

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14. In considering whether or not to apply the "actual malice" standard to P&G's Lanham Act claim, the district court concluded that the 1995 Haugen AMVOX message satisfied the definition of "commercial speech." T.T. 2263.

15. *See* 134 Cong. Rec. 31,851 (Oct. 19, 1988) (statement of Rep. Kastenmeier) (Lanham Act "specifically extends only to false and misleading speech that is encompassed within the 'commercial speech' doctrine of the United States Supreme Court"); 135 Cong. Rec. H1216-17 (daily ed. Apr. 13, 1989) (statement of Rep. Kastenmeier) ("[T]he proposed change in section 43(a) should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material . . . . The section is narrowly drafted to encompass only clearly false and misleading commercial speech.").

16. In that event, the courts quickly would be faced with (Cont'd)

III. CONSIDERATION OF THE ISSUES PRESENTED IN THE PETITION BY THIS COURT WOULD BE BOTH PREMATURE AND INAPPROPRIATE. FURTHER PROCEEDINGS IN THE DISTRICT COURT MIGHT OBVIATE THE NEED FOR DECIDING THOSE ISSUES.

In light of the Fifth Circuit's reversal of the *res judicata* ruling, the district court will revisit the level of proof that P&G must present in order to establish its Lanham Act claim.[17] The Fifth Circuit held that the record on the elements

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(Cont'd)
applying the "actual malice" standard not only in all civil actions based on false advertising, but also in governmental proceedings involving regulation of false advertising, including Federal Trade Commission proceedings.

17. No matter how this Court might resolve the "actual malice" issue presented by petitioners, further district court proceedings are inevitable and should provide further factual development and judicial analysis by the two courts below. This is due to the unique procedural history of this case and its present posture. At trial, P&G sought to hold Haugen and Walker *directly* liable for disseminating the Satanism rumor, and to hold Amway and all the high-level distributor defendants (including Haugen and Walker) *vicariously* liable for the dissemination of the Satanism rumor by their "downline" distributors. The district court ruled that the "actual malice" standard applied to both of those liability theories. T.T. 2274. At the close of P&G's case, petitioners moved for JML on P&G's Lanham Act claim, arguing that P&G had failed to prove Amway's, Haugen's, and Walker's actual malice. The district court disagreed and denied JML, T.T., p. 2307 ("actual malice has been established by the evidence"), but later held that *res judicata* barred any *direct* Lanham Act liability against Amway, Haugen, and Walker. T.T. 2766. With direct liability out of the picture, the court granted JML based on P&G's purported failure to prove actual malice by non-defendant "downlines," which it deemed necessary to hold Amway, Haugen, and Walker *vicariously* liable for the
(Cont'd)

of "commercial speech" was not sufficiently complete to allow it to determine whether the "actual malice" standard applies. Its decision contemplates that the district court will make that determination based on evidence adduced thus far and whatever additional material is presented on remand. App. 27a-28a.

Thus, the constitutional issues framed in the current petition are not, and may never become, ripe in this case. If they do prove to be relevant, a fuller record will have been developed on such critical matters as the speaker's economic motivation and the other characteristics of "commercial speech" and the views and analyses of the district court and the Fifth Circuit will be available to this Court. It is only when that process is completed that certiorari should be sought.[18] *Spector Motors Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944); *Wood v. Georgia*, 450 U.S. 261, 264-65, 101 S. Ct. 1097, 1100 (1981); *Youakim v. Miller*, 425 U.S. 231, 236, 96 S. Ct. 1399, 1402 (1976).

(Cont'd)
Satanism rumor. *Id.* at 2838-39. Because the Fifth Circuit properly reversed the *res judicata* ruling, App. 13a, and defendants' petition does not challenge that part of the court of appeals decision, the district court's JML could not be affirmed, even if this Court were to entertain and validate defendants' "actual malice" argument. At best, the Court would be granting review merely to prescribe the standard of proof that P&G would have to satisfy on remand.

18. In what may be a last-gasp attempt to entice the Court to intervene, petitioners allude to "an intermediate level of protection between 'actual malice' and strict liability." Petition, p. 26. Because petitioners did not argue for such a standard before the district court or the court of appeals, it would be inappropriate for this Court to address it. *United States v. United Foods, Inc.*, 121 S. Ct. 2334, 2001 WL 703953 (2001).

IV. BECAUSE THIS CASE INVOLVES AN EXTRAORDINARILY UNUSUAL FACTUAL SITUATION UNLIKELY TO BE REPLICATED, THE COURT SHOULD NOT ADDRESS PETITIONERS' PLEA TO ABANDON THE "COMMERCIAL SPEECH" DOCTRINE.

Petitioners assert that the "actual malice" standard should be applied whenever the speech concerns a public figure and touches on "a matter of public concern," regardless of the message's commercial nature. Petition, p. 20.[19] They implicitly concede there is no disagreement among the circuits on this issue, but contend that its importance alone justifies granting certiorari. In essence, petitioners are asking the Court to overrule *Central Hudson*, *Bolger*, and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 105 S. Ct. 2265 (1985), insofar as they held that speech of a commercial nature is not entitled to full constitutional protection merely because it is tied to an issue of public concern. *Central Hudson*, *supra*, 447 U.S. at 563 n.5; *Bolger*, *supra*, 463 U.S. at 68; *Zauderer*, *supra*, 471 U.S. at 637 n.7; App. 35a (quoting the Tenth Circuit's holding in *P&G v. Haugen*, *supra*, 222 F.3d at 1275).

Petitioners suggest that the AMVOX message warrants full constitutional protection because, when Haugen and others maligned their competitor as a devil worshipper, they were addressing "a matter of public concern" and their speech should be protected on that basis alone. The extraordinarily unusual factual setting in this case and the necessity for a remand to develop the factual record make this an inappropriate vehicle for considering such a radical departure

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19. The complaint alleged both Lanham Act Section 43(a) claim and a common law defamation claim. The district court granted JML on the defamation claim, but not because P&G failed to establish actual malice.

from the "commercial speech" doctrine. It would make the difficult task of fashioning a workable definition for "matters of public concern" that much more so.

Consider, for example, the "content, form, and context" test from *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762, 105 S. Ct. 2939 (1985),[20] applied to these facts. Although petitioners strain hard to emphasize the "religious" content of the AMVOX message, Petition, p. 17, its chief focus was on purely private commercial considerations.[21] It exhorted Amway distributors to "buy all the products that we want from our own shelf," namely, Amway products. T.E. 19. Stated conversely: "Don't buy from Satan." It referred to "business" four times, "products" three times, "buy" or "buying" three times, but did not mention "God" at all. *Id.* It did not even make an appeal to listeners' belief in, or loyalty to, a deity. Rather, it was an overt call for *brand* loyalty — to Amway. The message even closed with a classic Madison Avenue clincher:

> I tell ya, it really makes you count your blessings to have available to all of us a business that will allow us to buy all the products that we want from our own shelf and I guess my real question is, if people aren't being loyal to themselves and buying from their own business, then whose business are they supporting and who are they buying from.

Id.

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20. *Dun & Bradstreet*, 472 U.S. at 761 (requiring case-by-case appraisal of the expression's "content, form, and context . . . as revealed by the whole record" in order to determine if it addresses a public issue).

21. Amway has publicized AMVOX as a business tool capable of assisting distributors in "messaging the dream."

Nevertheless, attempting to cast Haugen as a sort of Thomas Aquinas-*cum*-Thomas Paine, petitioners characterize his dissemination of the message as an act of conscience based on religious conviction. Yet, Haugen admitted he listened to the incoming message while running on his treadmill and "it sold me," T.T. 1822-23, so he dispatched it to his "downlines" using a voicemail delivery function that automatically told all recipients, "Listen to it" and "Double your numbers." T.E. 19. Those facts, coupled with petitioners' contention that Haugen intended it only for a small "intracorporate" group[22] (Petition, p. 15; T.T. 1772), contradict their suggestion that he was contributing religious thought to a public debate.

Whatever its intended distribution might have been, there is no question how the message was received — as a matter of commercial, not religious, significance to Amway distributors. MSJ Opp. Exh. A5 (distributor forwarded it with the message "I think it would benefit everybody"). Even an internal Amway document admitted that

> Amway distributorships have chosen to play upon the public's religious beliefs and superstitions in what must be seen as an attempt to affect their buying decisions.

MSJ Opp., Exh. A36; *see also* MSJ Opp., Exhs. A3, A4; T.E. 1537 (Amway's Satanism flier, instructing consumers: "Stop buying Procter & Gamble products," and "We offer you an alternative.").

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22. That Haugen intended the message for his "downlines" or even a small subset of them does not detract from its commercial character. As the Fifth Circuit noted, these are the individuals upon whom he depends for his commissions. App. 27a; *see also* footnote 10, *ante*.

Even if the Court were inclined to consider whether all expression on issues of public concern should have constitutional protection regardless of its predominantly commercial nature, it would face the task of defining issues of public concern, a task whose difficulty the Court already has compared with that of defining "commercial speech." *Dun & Bradstreet*, *supra*, 472 U.S. at 762 n.8.[23] The extraordinarily unusual facts of this case, which are not yet fully developed and unlikely to be replicated, simply are not a proper context in which to open that Pandora's box.

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23. *See, e.g.*, *Bolger*, *supra*, 463 U.S. at 68 n.15 and cases cited therein ("public issues" were defined as "those 'about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period' " [internal citations omitted]). One court of appeals predicted before *Central Hudson*, *Bolger*, and *Zauderer* that, if constitutional protection for speech of a commercial nature depended on whether it addressed a public issue, advertisers could be expected to append phrases like "Brought to you in the public interest" to ads in order secure that protection. *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, *supra*, 570 F.2d at 163; *see also Bad Frog Brewery v. New York State Liquor Authority*, *supra*, 134 F.3d at 97 (addressing the contention that a beer label displaying a frog "giving the finger" is, in part, "political, or at least societal, commentary").

CONCLUSION

For the foregoing reasons, P&G respectfully requests that the Petition be denied.

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No. 01-29

IN THE
Supreme Court of the United States

AMWAY CORPORATION, RANDY HAUGEN, DEXTER YAGER, SR., RANDY WALKER, AND DONALD R. WILSON,

Petitioners,

v.

THE PROCTER & GAMBLE COMPANY AND THE PROCTER & GAMBLE DISTRIBUTING COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

P&G asserts that *certiorari* is unwarranted because the Fifth Circuit simply applied settled law to the facts of this case. That assertion is incorrect for the simple reason that there *is* no settled law in the area of commercial speech. As noted in the petition, this Court itself (not to mention individual Justices, the lower courts, and commentators) has acknowledged the inconsistency of the precedents in this area. Pet. 7-8, 22-23. In particular, this Court has suggested both that "commercial speech" means only advertising, *see, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion), and that it does not, *see, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). And this Court has held that the "actual malice" standard applies to commercial speech, *see, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), but has also suggested that it does not, *see, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). It is hardly surprising, therefore, that the lower courts are in disarray. This Court's authoritative guidance is badly needed, and this case provides a highly appropriate vehicle for resolving these recurring questions of great significance to our system of free expression.

I. THE DEFINITION OF "COMMERCIAL SPEECH" WARRANTS CERTIORARI.

The Fifth Circuit held that speech "at the heart of First Amendment protections" can be deemed commercial if the speaker's "motivation" is economic. App. 21a-22a, 24a-26a. As noted in the petition, that holding (i) reflects the confusion caused by this Court's jurisprudence on the definition of "commercial speech," (ii) conflicts with decisions of other courts of appeals, and (iii) undermines core First Amendment values. *See* Pet. 6-17.

In response, P&G argues that "there is no doctrinal confusion" on the definition of commercial speech, Opp. 16, and that it is "wholly fictitious" to suggest otherwise, *id.* at 1.

But P&G simply ignores the authorities Amway cited for that proposition. *See* Pet. 7-8 (citing, *e.g.*, *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); Laurence H. Tribe, *American Constitutional Law* 896 (2d ed. 1988)). Indeed, P&G itself relies on a case that *agrees* that "the boundary between commercial and noncommercial speech has yet to be clearly delineated." *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (cited in Opp. 22).

In addition to ignoring these authorities, P&G asserts that "[t]here are no genuine disagreements of significance among the courts of appeals" on the definition of commercial speech. Opp. 1, 14-16. Whatever P&G might mean by "genuine disagreements of significance," there is no question that there is a circuit split on this important question. Thus, P&G conveniently ignores the first case Amway cited on this point – *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679 (7th Cir. 1998). As explained in the petition, and unrebutted in the opposition brief, *Commodity Trend Service* is in conflict with the Fifth Circuit's decision because it limits "commercial speech" to the "traditional definition" set forth in several of this Court's precedents, while the Fifth Circuit adopted a broader definition based on *Bolger*. *See* Pet. 9.

P&G at least addresses the other Seventh Circuit case cited in the petition, *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986). *Woods* is directly on point. There (as here) a competitor of the plaintiff was alleged to have defamed him, "solely for profit," by misrepresenting his religious beliefs. *Id.* at 483-84. There (as here) the plaintiff argued that "actual malice" protections did not apply because the speech was commercial. *Id.* But there (*unlike* here) the court held that the speech was *not* commercial. *Id.* at 484.

P&G attempts to evade this square conflict by claiming that *Woods* arose under state law and the Seventh Circuit's discussion of federal law was therefore "*dictum*." Opp. 15. Actually, the Seventh Circuit addressed the First Amendment

issue under *both* federal *and* state law, relying on no fewer than seven precedents of this Court in doing so. *See* 791 F.2d at 483-84. Thus, the federal and state law discussions are alternative holdings equally entitled to "precedential weight;" there is no basis for deeming one controlling and the other *dictum*. *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897, 903 (7th Cir. 2001); *see also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."). As a result, the courts in the Seventh Circuit have followed *Woods* as a matter of federal law. *See Fleming v. Kane County*, 636 F. Supp. 742, 748 (N.D. Ill. 1986).

P&G also claims that the petition is "less than candid" in describing *Thomas v. Anchorage Equal Rights Comm'n* because that case "articulated the *Bolger* test clearly and applied it easily." Opp. 16. It is not Amway that has candor issues. In *Thomas*, the Ninth Circuit *declined* to follow *Bolger* because this Court had "cast serious doubt upon *Bolger*." 165 F.3d 692, 710 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (2000) (*en banc*). The Ninth Circuit then relied on other decisions of this Court for the proposition that commercial speech is limited to "a case of 'I will sell you X at the Y price.'" *Id.*

Indeed, after Amway filed its petition, the Ninth Circuit held once again – in a case relied on by P&G – that speech is commercial only if it is "a simple advertisement." *Hoffman*, 255 F.3d at 1185-86. The court recognized that the speech at issue in that case could "help to sell" the defendant's products. *Id.* at 1186. Nonetheless, the Ninth Circuit held that it was not "commercial speech" because it did not "simply advance a commercial message." *Id.* at 1185. Instead, "[a]ny commercial aspects are inextricably entwined with expressive elements, . . . so they cannot be separated out from the fully protected whole." *Id.* (internal quotations omitted). So too here, the speech was "not a simple advertisement," *id.* at 1186, but instead (in the words of the Fifth Circuit) addressed "issues that are at the

heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a.

For the same reason, the Fifth Circuit's decision is also in conflict with the Tenth Circuit's holding that "commercial speech is best understood as speech that *merely advertises* a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (emphasis added); Pet. 11 n.2. As with *Commodity Trend Service*, P&G does not even acknowledge *Cardtoons*, much less attempt to distinguish it.

Even if there were not a circuit split, and even if this Court's precedents did not require clarification, *certiorari* would still be warranted because of the importance of this issue. P&G does not dispute that this Court has granted *certiorari* in any number of First Amendment cases absent a circuit split. *See* Pet. 13, 25. Nor does P&G deny that the nationwide nature of corporations' speech makes it all the more important to grant *certiorari* now, since corporate speakers are effectively bound by the law of the least-protective circuit. *See id.* at 13.

Instead, P&G claims that the petition "distort[s] the Fifth Circuit's opinion" because that court "did not treat any single factor as determinative," but instead engaged in a "unique and fact-dependent" analysis. Opp. 12, 13, 18. As explained in the petition, the Fifth Circuit held that speech is commercial if it (i) references a product or service, and (ii) has a substantial economic motivation. *See* Pet. 10. The court explained that under this holding, it matters not whether the speech is "an advertisement in the classic sense." App. 25a. This decision not only conflicts with the decisions discussed above, it also undercuts core First Amendment values by focusing on the speaker's motivation. *See* Pet. 13-17. The petition illustrates the importance of this point by reference to several common scenarios, including speech by the media and consumer boycotters. *See id.* at 14, 16-17. P&G makes *no* attempt to distinguish *any* of these situations.

Nor are these concerns academic. A district court recently relied on the Fifth Circuit's decision to deprive public-interest groups of First Amendment protection. *See World Wrestling Fed'n Enter., Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001). In that case, the World Wrestling Federation ("WWF") sued parents of children who had been killed by other children imitating professional wrestlers. *See id.* at 519. The parents had organized public-interest groups to disseminate information about their belief that the WWF was responsible for their children's deaths. *See id.* at 521. The WWF sued for defamation, claiming that the parents had made incorrect and defamatory statements. *See id.* at 519-20. Relying on the Fifth Circuit's decision below, the district court held that the parents' speech was "commercial" because (i) the speech referenced products of the WWF, and (ii) the speech was included in letters that sought to raise funds for the public-interest group, and thus had an economic motive. *See id.* at 525-26. Like the Fifth Circuit, the *WWF* court thereby deprived core protected speech of First Amendment protection.

The *WWF* decision shows both the extent to which the "commercial speech" doctrine is straying from its advertising moorings and the danger posed by the Fifth Circuit's decision to First Amendment freedoms. It also refutes P&G's contention that this case presents an "extraordinarily unusual factual setting" that is unlikely to recur. Opp. 26. The facts will change from case to case, but the legal principle is an important and recurring one.

II. THE APPLICABILITY OF "ACTUAL MALICE" PROTECTIONS TO COMMERCIAL SPEECH WARRANTS CERTIORARI.

Even if the speech at issue were "commercial," the Fifth Circuit still erred by holding that the "commercial speech" label alone dictates the applicable level of constitutional protection. Amway's petition explains that this holding (i) conflicts with this Court's defamation precedents, (ii) reflects the uncertainty created by this Court's "commercial speech" jurisprudence,

(iii) conflicts with decisions of other courts, and (iv) undermines core First Amendment values. *See* Pet. 18-28.

Public figure P&G completely ignores the first two of these points. It makes no attempt to reconcile the Fifth Circuit's decision with *Dun & Bradstreet, Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), or *New York Times v. Sullivan*, 376 U.S. 254 (1964). Nor could it. Those cases hold that the applicability of "actual malice" protections turns on whether the plaintiff is a public figure or public official and whether the speech addresses matters of public importance – *not* whether the speech could also be deemed "commercial." *See* Pet. 18-20.

Nor does P&G deny that the Fifth Circuit's decision reflects the confusion caused by the "uncertain course" of this Court's commercial speech jurisprudence. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2432 (2001) (Thomas, J., concurring in part and in judgment); *see also* Pet. 22-24. In some cases, this Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501. But in other cases, this Court has relied exclusively on the "commercial speech" label in determining the level of constitutional protection. *See, e.g., Central Hudson*, 447 U.S. at 561-66. Instead of addressing this point, P&G selectively cites cases that support its merits position while ignoring all others. *See* Opp. 23.

With respect to the disagreement among the lower courts, P&G claims that "this controversy proves as illusory as the others" because two other courts of appeals have agreed that "actual malice" protections do not apply to commercial speech. Opp. 22. But the fact that two courts have agreed with the Fifth Circuit does not mean that other courts have not disagreed; it just means that this is a recurring issue that has percolated in the lower courts and is ready for this Court's resolution.

Indeed, P&G concedes that the Fifth Circuit's decision is "contrary" to two other decisions, albeit not federal court of

appeals decisions. Opp. 22 n.13. But P&G ignores (once again) the circuit court decisions Amway cited on this point – *Woods* and *Garcia v. Board of Education*, 777 F.2d 1403, 1410 (10th Cir. 1985). Those cases conflict with the decision below because they hold that "it is *immaterial* to the application of the qualified constitutional privilege [of actual malice] that the defendants may have profited from the publication at issue." *Woods*, 791 F.2d at 484 (emphasis added); *see also Garcia*, 777 F.2d at 1410. Nor does P&G dispute that other circuit courts have assumed that "actual malice" protections apply to commercial speech. *See* Pet. 24, 25.

Finally, P&G does not (and cannot) deny that this is the type of important First Amendment issue on which this Court has granted *certiorari* even absent a circuit split. *See* Pet. 25 (citing *New York Times* and *Hustler*). Instead, P&G misportrays Amway's position and advances a series of *merits* arguments that, while wrong, underscore the importance of the issue.

P&G argues, for example, that "[i]n essence, petitioners are asking this Court to overrule *Central Hudson*, *Bolger*, and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985), insofar as they held that speech of a commercial nature is not entitled to full constitutional protection . . . ." Opp. 26. P&G likewise asserts that Amway's argument rests on the proposition that the "commercial speech" doctrine applies only to "direct governmental regulation of speech," and not to *any* private lawsuits. Opp. 20. Those are two approaches to resolving the "actual malice" question. But this question can also be decided on the narrower (and commonsense) ground that defamation cases are governed by this Court's defamation precedents, rather than by inapposite cases like *Zauderer*. *See* Pet. 18-24. As noted above, this Court already determined that the constitutional protections accorded to defamation defendants do not turn on whether the speech is "commercial." *Dun & Bradstreet*, 472 U.S. at 762 n.8; Pet. 19-20. P&G does not even acknowledge this point; it

just asserts a contrary position in a conclusory manner. *See* Opp. 23, 26.[1]

III. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR RESOLVING THESE IMPORTANT QUESTIONS.

This case presents an excellent vehicle for resolving the questions presented because there is no question that P&G is a limited-purpose public figure and the speech involves a matter of public importance. *See* Pet. 18-19; *see also id.* at 4-5. While P&G now attempts to sow confusion on the second of these points, *see* Opp. 26-29, the Fifth Circuit could not have been clearer that the speech addresses "the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. Because the relevant facts were settled below, the questions presented are squarely framed for this Court's resolution.

P&G nonetheless argues that this Court should deny *certiorari* because of the interlocutory posture of this case. *See* Opp. 24-25. The short answer is that this Court routinely grants *certiorari* in such circumstances to settle important legal issues that could resolve the case and provide guidance to other courts. *See, e.g., Seling v. Young*, 531 U.S. 250 (2001); *Duncan v. Walker*, 531 U.S. 991 (2001); *TrafFix Devices, Inc. v.*

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[1] P&G's other merits arguments are especially weak. P&G argues that upholding First Amendment protections would limit plaintiffs' ability to recover under the Lanham Act. *See* Opp. 23. That hardly matters: protecting speakers from punishment is the essence of the First Amendment. P&G also notes that if traditional defamation principles applied, the courts would have to decide whether the plaintiff was a public official or public figure and whether the speech involved a matter of public importance. *See* Opp. 29. Far from a "Pandora's box," as P&G claims, *id.*, these elements have been considered by courts in countless defamation cases over the past decades. Indeed, the district court's holdings that P&G is a public figure and the speech involved a matter of public concern were not even challenged by P&G in the court of appeals. *See* Pet. 18-19.

Marketing Displays, Inc., 121 S. Ct. 1255 (2001); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 121 S. Ct. 1927 (2001). This is especially true in First Amendment cases, since the constitutional right not to be punished for exercising the right to free speech should be vindicated at the earliest possible moment. Thus, this Court has reviewed a commercial speech decision that remanded for factfinding, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), as well as a defamation decision that remanded for a new trial, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). That is exactly what Amway is asking the Court to do here.[2]

Interlocutory *certiorari* is especially appropriate in this case because a ruling in Amway's favor would be dispositive. While P&G now disputes this point in a footnote, *see* Opp. 24 n.17, it is far too late in the day for P&G to change its tune. In the district court, P&G repeatedly admitted that it could not prove actual malice. *See* R39/2780 ("we never proved that they passed on a statement that they themselves believed to be untrue . . . which as I understand, is where our burden is"); *see also id.* at 2799, 2937. Indeed, after the district court ruled that P&G was required to prove actual malice, P&G told the court that it was no longer "desirous of taking the case to the jury," and "the Court should act accordingly" in disposing of the case. *Id.* at 2838-39. Thus, the Fifth Circuit quite rightly noted that "[t]here is no evidence that Haugen knew the rumor was false when he spread it." App. 7a.

Reversal of the Fifth Circuit's decision would also protect the distributors' freedom of conscience. The Fifth Circuit's

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[2] The constitutional avoidance cases cited by P&G, *see* Opp. 25, are inapposite because the lower courts already – and necessarily – reached the First Amendment issue in this case. Thus, a denial of *certiorari* would not avoid a constitutional issue, but would leave an erroneous constitutional decision in place. To be sure, petitioners might win on remand, but that is true of every interlocutory case in which this Court grants *certiorari*, including those discussed above in the text.

remand would turn the First Amendment on its head by subjecting speakers to an intrusive probing of their beliefs and motivations – an outright violation of their freedom of conscience – as the price for invoking the First Amendment. *See* Pet. 17; *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976).

P&G responds that testifying about one's subjective motives is no different than testifying about whether one knew the speech was false (and thus acted with actual malice). *See* Opp. 19. But it is one thing to testify about which objective facts one did or did not know; it is quite another to be cross-examined on the genuineness of one's convictions and motivations, be they political, religious, or other. P&G also notes that the distributors could choose not to testify about their motives on remand, *see id.*, but that is precisely the point – unless the distributors subjected themselves to a violation of their First Amendment freedom of conscience, they would be hamstrung in their attempt to present a First Amendment defense. Either way, their First Amendment rights would be infringed. Thus, review of these important constitutional issues should occur before, not after, remand.[3]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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[3] P&G makes two additional assertions that should be set straight. *First*, P&G claims in a footnote that Amway seeks review of only P&G's Lanham Act claim. *See* Opp. 10 n.6. In reality, the petition is quite clear that it seeks review of the federal *and* state claims based on the Satanism rumor. *See* Pet. 2, 5-6, 19. *Second*, P&G claims that the Fifth Circuit reversed the dismissal of its claims against three defendants who have not petitioned for *certiorari*: Ja-Ri Corporation, Amway Distributors Association, and Internet Services Corporation. *See* Opp. (i). P&G is wrong. *See* App. 10a n.6 (Internet Services Corporation), 38a-40a (Ja-Ri Corporation and Amway Distributors Association). Moreover, this point is irrelevant for present purposes because all of the parties to the proceedings below are automatically deemed parties in this Court. *See* S. Ct. R. 12.6; *Director v. Perini N. River Assocs.*, 459 U.S. 297, 303-04 (1983).

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